TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 186.

PETER JONES, GEORGE L. DE COTTES, AND WILLIAM S. WHITLOCK, PLAINTIFFS IN ERROR,

vs.

JOHN BUCKELL AND MARY E. BUCKELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

FILED APRIL 30, 1879.

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1 Pleas in the circuit court of the State of Florida for the 4th judicial circuit in and for the county of Duval, in a certain case therein wherein John Buckell and Mary E. Buckell are plaintiffs, and Peter Jones and George L. De Cottes are defendants.

Be it remembered that on the 5th day of September, in the year of our Lord one thousand eight hundred and seventy-six, came John Buckell and Mary E. Buckell, plaintiffs in the case aforesaid, by A. Doggett, their attorney, and filed in the clerk's office of the circuit court aforesaid his præcipe for a summons ad respond'um in the words and figures following, to wit:

In the 4th judicial circuit court, Duval County, Florida.

JOHN BUCKELL AND MARY E. BUCKELL
vs.
PETER JONES & GEORGE L. DE COTTES. } Ejectment.

The clerk will please issue summons ad respond'um in above entitled cause returnable to rule day in October, 1876.

2 A. DOGGETT,
Plaintiffs' Att'y.

In the circuit court Duval County, Florida.

JOHN BUCKELL & MARY E. BUCKELL
vs.
PETER JONES AND GEORGE L. DE COTTES. } Ejectment.

Description of property claimed by plaintiffs and amount claimed by plaintiffs of defendants on account of mense profits, to wit:

A part or portion of water lot number five, situate, lying, and being in the city of Jacksonville, county Duval, and State of Florida, said part or portion of said lot being the same on which there is a steam-mill and wharf used and occupied by said defendants; also water lot number six, lying and being in said city, county, and State, excepting so much of said lot, in the northwestern corner thereof, having a frontage on Bay street (of said city) of forty feet and running towards the St. John's River forty-five feet and being the property of Joseph Santo; and three thousand dollars as claimed as mense profits.

A. DOGGETT,
Plaintiffs' Att'y.

Filed Sept. 5, 1876. Edwin Higgins, cl'k, by H. Jenkins, jr., D. C.

3 Whereupon a summons and respond'um issued from the clerk's office aforesaid, which, with the return and endorsement thereon, is in the words and figures following:

The State of Florida *for* the sheriff of Duval County, greeting:

You are hereby commanded to summon Peter Jones and George L. De Cottes, if they be found in your county, to be and appear before the judge of our circuit court for the fourth judicial circuit of the State of Florida, at the clerk's office in Jacksonville, on the first Monday of October next, at a court to be held that day in and for the county of

Duval, then and there to answer John Buckell and Mary E. Buckell in an action of ejectment, damages three hundred dollars, and have then and there this writ.

Witness Edwin Higgins, clerk of said circuit court for
4 said county of Duval, and the seal of said court, at Jacksonville, this fifth day of September, A. D. 1876.

[SEAL. EDWIN HIGGINS,
Clerk Circuit Court.

A. DOGGETT,
Pl'ff's Att'y.

(Copy.)

Description of property.

Description of property claimed by plaintiffs and amount claimed by plaintiffs of defendants on account of *mense* profits, to wit:

A part or portion of water lot number five, situate and lying and being in the city of Jacksonville, county of Duval, and State of Florida, said part or portion of said lot being the same on which there is a steam-mill and wharf, used and occupied by said defendants; also water lot number six, situate, lying and being in said city, county, and State, excepting so much of said lot in the northwestern corner
5 thereof, having a frontage on Bay street (of said city) of forty feet and running towards the St. John's River forty-five feet and being the property of Joseph Santo; and three thousand dollars are claimed as *mense* profits.

A. DOGGETT,
Pl'ff's Att'y.

Received this writ September 5th, A. D. 1876, and served the same by delivering a true copy thereof to the within named defendants, Peter Jones & Geo. L. De Cottes, the same date.

JOHN S. DRIGGS, *Sheriff,*
By JNO. H. BROWN, *Deputy.*

Filed Oct. 2nd, 1876. Edwin Higgins, cl'k, by H. Jenkins, jr., D. C.

And upon the fifth day of September, in the year of our Lord one thousand eight hundred and seventy-six, the plaintiffs, by their
6 attorney, filed in the clerk's office aforesaid their declaration in the words and figures following, to wit:

In the circuit court of Florida, fourth circuit, Duval County.

John Buckell and Mary E. Buckell, by their attorney, complain of Peter Jones and George L. De Cottes, who have been summoned to answer them in an action of ejectment, for that whereas the defendants are in possession of a certain tract or parcel of land suitable, lying, and being in said county, known and described as follows, to wit:

A part or portion of water lot number five, suitable, lying, and being in the city of Jacksonville, county of Duval and State of Florida, said part or portion of said lot being the same on which there is a steam-mill and wharf, used and occupied by said defendants; also water lot number six, suitable, lying, and being in said city, county, and
7 State, excepting so much of said lot in the northwestern corner

thereof, having a frontage on Bay street (of said city) of forty feet, and running towards the St. John's River forty-five feet, and being the property of Joseph Santo, to which said plaintiffs claim title. And the defendants have received the profits of said land since the 15th day of February, A. D. 1875, of the yearly value of two thousand dollars, and refuse to deliver the possession of said land to the plaintiffs, or to pay them the profits thereof.

A. DOGGETT,
Pl'ff's Att'y.

Filed September 5th, 1876. Edwin Higgins, cl'k, by H. Jenkins, D. C.

And afterwards, to wit, on the 26th day of October, in the year of our Lord one thousand eight hundred and seventy-six, the said defendant', by their attorney, filed in the clerk's office aforesaid their plea, in the words and figures following:

8 4th judicial court, Duval County, Florida.

JOHN BUCKELL AND MARY E. BUCKELL }
vs.
PETER JONES AND GEORGE A. DE COTTES. }

And now, November sixth, A. D. 1876, comes into court, by summons of said court, William S. Whitlock, as defendant, by his attorney in fact, J. H. Norton, by Anno & Marcy, his attorneys at law, who says that he is the owner of the premises in question (and that the defendants named are but tenants by lease), that he is not guilty of the supposed trespass and ejectment above laid to his charge in any part thereof in manner and form as the said John and Mary E. Buckell hath complained against him, and of this he, the said William A. Whitlock, puts himself upon the country.

ANNO AND MARCY,
Att'ys for Plaintiff.

9 STATE OF FLORIDA, *County of Duval, ss:*

Personally appeared before me Mr. John H. Norton, attorney in fact for William S. Whitlock, owner of the premises in question for which this ejectment is brought, who deposes and says the facts set forth in the above pleas are just and true, and that the defendant and owner is absent from the State, and resident of the State of New York, and that the affiant is authorized to make the above plea for him.

J. H. NORTON.

Sworn to and subscribed before me this 6th November, 1876.

J. H. BOURS, JR., [SEAL.]
Notary Public.

Filed November 6th, 1876. E. Higgins, clerk.

10 And afterwards, to wit, on the first day of June, in the year of our Lord one thousand eight hundred and seventy-seven, the defendants, by their attorney, filed in the clerk's office aforesaid their petition for the removal of said cause for trial to the United States circuit court, 5th judicial circuit, for the northern district of Florida, which is in the words and figures following.

In circuit court, 4th judicial circuit of Florida, Duval County.

JOHN BUCKELL & MARY E. BUCKELL
vs.
PETER JONES AND GEO. L. DE COTTES. } Ejectment.

Your petitioner, William S. Whitlock, by his attorney in fact, John H. Norton, respectfully represents unto this honorable court that he is the defendant in a suit of ejectment instituted by John Buckell and Mary E. Buckell (against Peter Jones and Geo. L. De Cottes, being tenants of William S. Whitlock, your petitioner herein),
11 plaintiffs in the circuit court of the State of Florida and for the county of Duval.

That the said suit is of a civil nature, and is now pending in the said State court, and that the matter in dispute therein exceeds, exclusive of costs, the value of five hundred dollars, and arises under a law of the United States, to wit, "An act to confiscate property used for insurrectionary purposes," and approved August 6th, A. D. 1861.

That your petitioner is a citizen of the State of New York, and not a citizen of the State of Florida. That the plaintiffs are residents of the State of Florida, in the county of Duval.

That this petition is filed within the time prescribed by the act of Congress under which the removal is sought to be made.

Your petitioner herewith respectfully tenders a bond with good and sufficient su'rity for his entering in the circuit court of the United
12 States for the northern district of Florida, on the first day of its next session, a copy of the record in said suit, and for paying all costs that may be awarded by the said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto.

Wherefore your petitioner prays that the said suit may be removed from the said State court to the said circuit court of the United States, and will ever pray, &c.

WILLIAM S. WHITLOCK,
By JOHN H. NORTON,
Attorney in Fact.

Filed June 1st, 1877. T. E. Buckman, clerk.

And upon the same day the said defendant filed his bond, which, with the approval thereof, is in the words and figures following:

Known all men by these presents that we, William S. Whit-
13 lock (by J. H. Norton, attorney in fact), as principal, and R. N. Ellis and Damon Greenleaf, as secureties, are held and firmly bound unto John Buckell and Mary E. Buckell and Francis Yale in the sum of two hundred and fifty dollars lawful money of the United States, for the payment whereof, well and truly to be made, we bind ourselves, heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this first day of June, A. D. 1877.

The condition of this obligation is such that whereas in a suit of ejectment pending in the circuit court of Duval County, State of Florida, between John Buckell and Mary E. Buckell, plaintiffs, and Peter Jones and George L. De Cottes and William S. Whitlock (by care of court) & the above-bounded obligor, defendant', the said William S. Whitlock has filed a petition for the removal of said suit to the circuit

court of the United States for the northern district of Florida: Now
14 if the said William S. Whitlock shall enter in the said circuit court of the United States, on the first day of its next session in said district, a copy of the records of said suit, and shall pay all costs that may be awarded by the circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation to be of full force; otherwise void.

WILLIAM S. WHITLOCK, [SEAL.]
By J. H. NORTON, *Att'y in Fact.*
R. N. ELLIS. [SEAL.]
DAMON GREENLEAF. [SEAL.]

Taken and approved before me this first day of June, A. D. 1877.
[SEAL.] T. E. BUCKMAN,
Clerk Circuit Court Duval Co., Fla.

Filed June 1st, A. D. 1877. T. E. Buckman, clerk c't c't.

And upon the same day the said defendant, by his attorney,
15 entered his motion in open court for the removal of said suit; which said motion, together with the order of the court thereon, is in the words and figures following:

JOHN BUCKELL & MARY E. BUCKELL
vs.
PETER JONES AND GEO. L. DE COTTES & (by leave of court) Wm. S. Whitlock. } Ejectment.

And now, June 1st, 1877, the defendant William S. Whitlock, filing herewith petition and bond, pray *to* removal of said cause from the circuit court of the 4th judicial circuit of Florida to the circuit court for the northern district of the State of Florida.

J. C. MARCY,
J. H. NORTON,
W. R. ANNO,
Df'ts' Attorneys.

Motion granted 2nd June, A. D. 1877.

J. B. DAWKINS,
Judge, &c.

16 And upon the same day, during the sitting of the said circuit court in and for the county of Duval, State of Florida, was made the following order:

JOHN BUCKELL & MARY E. BUCKELL & FRANcis Yale
vs.
PETER JONES & GEO. L. DE COTTES & WILLIAM S. Whitlock. } Ejectment.

Ordered, that the above-entitled cause be removed for trial to the United States circuit court, fifth judicial *court* of the northern district of Florida.

* * * * * * *

I, T. E. Buckman, clerk of the circuit court of the State of Florida, 4th judicial circuit in and for the county of Duval, do hereby certify

that the foregoing pages numbered from one to nineteen, exclusive, constitute a true copy of all the proceedings and a correct transcript of the record in the case of John Buckell and Mary E. Buckell,
17 plaintiffs, and Peter Jones & George L. De Cottes and William S. Whitlock, defendent', as appears upon the files and records of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court this 28th day of August, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] T. E. BUCKMAN,
Clk Circuit Court Duval Co., Fla.

(Indorsed:) In circuit court 4th judicial district of Florida, Duval Co. John Buckell et *el.* vs. Peter Jones & De Cottes et *el.* Copy of proceeding filed Nov. 14th, 1877. P. Walter, clerk. J. C. Marcy.

18 *Libby to Willey.*

This indenture made the twenty-first day of May, one thousand eight hundred and thirty-six, between Hammond Libbs, of the city of Portsmouth, in the State of New Hampshire, of the first part, and Charles Willey, of the city and State aforesaid, of the second part,

Witnesseth that the said party of the first part, for and in consideration of the sum of one hundred and twenty dollars to him in hand paid, the receipt whereof is hereby confessed and acknowledged, does grant, bargain, sell, remise and release unto the said party of the second part, and to his heirs and assigns forever,

All that certain piece or parcel of land situate, lying and being in the town of Jacksonville, in the county of Duval and Territory of Florida, and containing fifty-two and a half feet front, known as part of lot number five, and bounded as follows, to wit: On the north by Bay
19 street, on the east by part of said lot No. five, on the south by the river St. John's, and on the west by lot No. six:

To have and to hold the said lot or parcel of land, together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, claim or demand whatsoever of the said party of the first part, either in law or in equity, of, in, and to the above bargained premises, with the said appurtenances:

To have to hold the said premises above described to the said party of the second part, and to his heirs and assigns, to the sole and only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

HAMMOND LIBBY. [SEAL.]

Signed, sealed and delivered in the presence of—
OLIVER WOOD,
JN. L. DOGGETT.

20 DUVAL COUNTY, FLORIDA, *June 24th*, 1836.

Be it remembered that on this day came Hammond Libbey, the grantor to the above deed, and acknowledged to be his own act and deed for the purposes therein mentioned.

JN. L. DOGGETT,
Judge County Court, Duval County.

CLERK'S OFFICE, *Duval County, ss:*

Be it remembered that on this 9th day of July I have recorded the above deed at the request of Charles Willey.

Witness my name as clerk of the county aforesaid, the date aforesaid. Recorded in book C, page 243.

ISAIAH D. HART, *Clk.*

STATE OF FLORIDA, *County of Duval, ss:*

I, clerk of the circuit court in and for said county, hereby certify that the foregoing is a true copy from the public records of said county.

Witness my hand and seal of said court this 18th day of November, A. D. 1876.

EDWIN HIGGINS, *Clk.*

(Indorsed:) Certified copy of deed from Hammond Libby to Charles Willey, May 21, 1836, put in evidence. P. Walker, cl'k, O. W. Bromwell, D. C.

21 *Isaiah D. Hart to Charles Willey.*

This indenture made the (4th) fourth day of June, in the year of our Lord one thousand eight hundred and forty-one, between Isaiah D. Hart, of Jacksonville, Duval County, in the Territory of Florida, and Nancy A., his wife *his wife*, of the first part, and Charles Willey, of the same place, of the second parts, witnesseth:

That the said party of the first part, for and in consideration of the sum of two hundred dollars, lawful money of the United States, to them in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns, all that certain lot or parcel of land situated, lying, and being in the said town of Jacksonville, in the county and Territory aforesaid,
22 known and described in the place of said town as part of lot number five, and bounded as follows, to wit: on the north by Bay street, on the east by Market, on the south by St. John's River, and on the west by the remaining part of said lot number five, on which stands the dwelling house of the said Charles Willey; together with all and singular the ten'*a*nts, hereditaments, and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, dower, right of dower, property, claim, and demand in law or equity whatsoever of the said parties of the first part of, in, and to the aforesaid business and every part thereof; to have and to hold the said lot of land and all and singular other the premises above mentioned and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit, and behoof of him the
23 said party of the second part, his heirs and assigns, forever. And the said parties of the first part, for themselves and their heirs, the said premises and every thereof, against themselves and against all and every other person and persons whomsoever to the said party of the second part, his heirs and assigns, shall and will by these present' forever warrant and defend.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

I. D. HART. [SEAL.]
N. A. HART. [SEAL.]

Signed, sealed, and delivered in presence of—
H. R. BLANCHARD,
Justice of the Peace.
B. KING JONES.

Know all men by these presents that I, Nancy A. Hart, wife of Isaidah D. Hart, the granton in the foregoing deed, do hereby acknowledge that I signed and sealed the same with the intent thereby to renounce, relinquish, and forever quitclaim to my dower and right of dower
24 to all and singular the land and premises in the said deed mentioned, and that the said renunciation and relinquishment was made freely and voluntarily, and without any compulsion, constraint, apprehension, or fear of or from my said husband.

In witness whereof I have hereunto set my hand and seal this 1st day of July, A. D. 1841.

N. A. HART. [SEAL.]

TERRITORY OF FLORIDA, *Duval County:*

Be it remembered that on this first day of July, in the year of our Lord one thousand eight hundred and forty-one, before me the subscriber, a justice of the peace in and for the county aforesaid, duly commissioned and qualified according to law, personally came Nancy A. Hart, wife of the within named Isaiah D. Hart, and, separately and apart from her said husband, made and executed the foregoing acknowledgement.

In testimony whereof I have hereunto subscribed my name
25 and affixed my seal the day and year aforesaid.

HARRISON R. BLANCHARD, [SEAL.]
Justice of the Peace.

CLERK'S OFFICE, *Duval County, ss:*

Be it remembered that on this 2nd day of July, A. D. 1841, came before me the subscriber, deputy clerk of the court for the county aforesaid, B. King Jones, and made oath that he heard J. D. Hart acknowledge the signature purporting to be his above to be his true and genuine signature for the purpose therein mentioned, and that he signed his name thereto as a witness. Wherefore I have recorded the same.

Witness my name as deputy clerk aforesaid, date aforesaid.

OSSIAN B. HART, *D. C.*

Recorded in book D, page 431.

STATE OF FLORIDA,
County of Duval, ss:

I, Edwin Higgins, clerk of the circuit court in and for said
26 county, hereby certify that the foregoing is a true copy from the public record of said county.

Witness my hand and seal of said court this 18th day of November, A. D. 1876.

[SEAL.] EDWIN HIGGINS, *Clerk.*

(Indorsed:) Certified copy of deed from Isaiah D. Hart to Charles

Willey, June 4th, 1841, put in evidence. Philip Walter, cl'k, O. W. Bramwell, d'p'ty.

27 *Isaiah D. Hart to Charles Willey—Deed of bargain and sale.*

This indenture, made this thirtieth day of July, in the year of our Lord one thousand eight hundred and forty-five, between Isaiah D. Hart, of the town of Jacksonville, Duval County, and State of Florida, of the one part, and Charles Willey of the same place of the other part,

Witnesseth that the said Isaiah D. Hart, for and in consideration of the sum of three hundred dollars lawful money of the United States to him by the said Charles Willey in hand paid, the receipt whereof the said Isaiah doth hereby acknowledge, hath granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said Charles Willey, his heirs and assigns,

A certain piece of land situate, lying, and being in the town, county, and State aforesaid, and known on the place or plat of said town as water lot number six (No. 6), containing from east to west, on
28 Bay street, forty feet, and from east to west on the river St. Johns, eighty feet (John M. Pons, esq., owns in the northwest corner of said lot number six forty feet by forty-five; that is to say, forty feet on Bay street, and running down towards the river forty-five feet). Said piece of land is bounded as follows: On the north by Bay street; on the east by lands owned or occupied by Morris Kiel; on the south by the river St. Johns, and on the west by a lot owned by William B. Ross, and partly by the aforesaid John M. Pons:

To have and to hold the said lot or parcel of land, with the appurtenances thereto belonging, to him, the said Charles Willey, his heirs and assigns, to the only proper use and behoof of the said Charles Willey, his heirs and assigns forever. And the said Isaiah D. Hart, for himself, his heirs, executors, and administrators, doth hereby covenant and agree to and with the said Charles Willey, his heirs and assigns, that he, the said Isaiah D. Hart, and his heirs, the said parcel of land with the appurtenances unto him, the said Charles Willey, his
29 heirs and assigns, against him, the said Isaiah D. Hart and his heirs, and against all persons whomsoever, shall and will by these presents forever warrant and defend.

In witness whereof the said Isaiah D. Hart hath hereunto set his hand and seal the day and year first above written.

I. D. HART. [SEAL.]

Signed, sealed, and delivered in presence of us—
JNO. M. PONS.
JOS. A. BARBER.

STATE OF FLORIDA,
County of Duval:

I, Nancy Hart, of said county and State, wife of the above named Isaiah D. Hart, for and in consideration of the said sum of three hundred dollars paid by the said Charles Willey to the said Isaiah D. Hart, and for the further consideration of one dollar to me in hand paid by the said Charles Willey, do hereby release, relinquish, and renounce all dower claim or right of dower, as the wife of the said Isaiah D. Hart, in and unto the above described lot or parcel of land above conveyed unto the said Charles Willey, his heirs, executors, and as-

signs, and I do further acknowledge that I have made the foregoing relinquishment of dower and right of dower with my own free will and accord without fear, restraint, or compulsion from my said husband, the said Isaiah D. Hart.

In witness whereof I have hereunto set my hand and seal this seventeenth day of September, in the year of our Lord one thousand eight hundred and forty-six.

N. A. HART. [SEAL.]

Signed, sealed, and delivered in presence of us, as witness—
L. C. HART.
J. MIDDLETON.

STATE OF FLORIDA,
County of Duval:

Personally appeared before me, an acting justice of the peace for and within the above named county and State, the aforesaid Nancy Hart, known to me as the wife of aforesaid Isaiah D. Hart, who, being examined by me privately and separately, and apart from her aforesaid husband, touching her relinquishment of all right or claim to dower in the foregoing described premises, acknowledged that the same had been done by her with her own free and voluntary will and accord, and without fear, contraint, or compulsion from her said husband.

In witness whereof I have hereunto set my hand and seal, on this 29th day of September, 1846.

J. MIDDLETON, [SEAL.]
Justice of the Peace.

STATE OF FLORIDA,
County of Duval:

On this sixteenth day of October, A. D. 1846, before me, clerk of the circuit court for said county, personally came John M. Pons, esq., one of the subscribing witness' to the foregoing indenture, and made oath in due form of law that he saw Isaiah D. Hart, the grantor in said indenture, sign, seal, and deliver the same, for the uses and purposes therein mentioned; wherefore I have duly recorded the same, together with the relinquishment of dower and the certificate of said relinquishment of dower, *and the certificate of said relinquishment* thereto attached, in the public records of said county in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court.

OSCAR HART, *Clerk.*

STATE OF FLORIDA,
County of Duval, ss:

I, Edwin Higgins, clerk of the circuit court in and for said county, hereby certify that the foregoing is a true copy from the public records of said county.

Witness my hand and seal of said court this 18th day of November, A. D. 1876.

EDWIN HIGGINS, *Clerk.*

(Indorsed:) Deed. Isaiah D. Hart to Charles Willey. Certified copy, June 30, 1845, put in evidence. P. Walter, cl'k, O. W. Bromwell, d'p'ty.

33 *John S. Sammis to Charles Willey.—Deed.*

This indenture made the third day of January, A. D. 1857, between John S. Sammis, of the county of Duval, Florida, and Charles Willey, of the same place,

Witnesseth that the said John S. Sammis, for and in consideration of six hundred and fifty-four dollars to him in hand paid at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed, and confirmed, and by these presents doth grant, bargain, sell, convey, and confirm, unto the said Charles Willey, and to his heirs and assigns,

All that certain piece or parcel of land lying and being in the town of Jacksonville, county of Duval and State of Florida, and known and described upon the place or plot of said town, as a part of water lot number six, it being the eastern portion of said lot, measuring
34 from east to west twenty-five feet, and bounded as follows: on the east by lot number five, on the north by Bay street, on the west by the remaining portion of said lot, and on the south by St. Johns River, being the same property conveyed by Isaiah D. Hart to O. B. Hart in trust for Elizabeth Kiel, by a separate deed recorded in the clerk's office, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof:

To have and to hold all and singular the above-described premises and the appurtenances unto the said Charles Willey and to his heirs and assigns forever.

And the said John S. Sammis, for himself, his heirs, executors, and administrators, the said bargained and sold premises unto the said Charles Willey, heirs and assigns, will warrant and forever defend the right and title thereof against themselves, and against all and every person or persons whomsoever lawfully claiming the same,
35 or any part or parcel thereof.

In witness whereof the said John S. Sammis hath set his hand and seal the day and year first above written

JOHN S. SAMMIS. [SEAL.]

Signed, sealed, and delivered in the presence of—
F. J. WHEATON,
GEO. STONE.

STATE OF FLORIDA,
Duval County, ss:

Be it known that on the third day of January, 1858, came before me, George Stone, clerk of the circuit court for the county aforesaid, John S. Sammis, who executed the foregoing conveyance, and acknowledged the same to be his act and deed for the purpose therein expressed.

Given under my hand at Jacksonville, in said county, the day and year aforesaid.

GEO. STONE,
Clerk C. C. D. C.

Know all men by these presents that I, Mary K. Sammis, wife of John S. Sammis within named, for and in consideration of the
36 sum of one dollar to me in hand paid by Charles Willey, at and before the ensealing and delivery of these presents, have remised, released, and forever quitclaimed, and do by these presents

remise, release, and forever quitclaim unto the said Charles Willey, and to his heirs and assigns, all and all manner of dower and right and title of dower, and other interest, right, and title whatever, which the said Mary K. Sammis now have, may, might, should, or by right ought to have, or claim of, in, to, or out of the within-described premises with the appurtenances, granted unto the said Charles Willey, and every part and parcel thereof; and I, the said Mary K. Sammis, do hereby acknowledge and declare that I freely and voluntarily renounce and relinquish all my dower and right and title of dower in the premises within named without any compulsion, constraint, apprehension, or fear of or from my said husband, the said John S. Sammis.

In witness whereof I have hereunto set my hand and seal this twentieth day of October, 1860.

37 MARY K. SAMMIS. [SEAL.]

Signed, sealed, and delivered in the presence of—
C. R. STONE.
F. F. L. ENGLE.

STATE OF FLORIDA,
Duval County,

Be it known that on the 20th day of October, 1860, came before me Mary K. Sammis, wife of John S. Sammis, who executed the foregoing conveyance and reliquishment of dower, and acknowledged the same to her free act and deed for the purposes therein expressed.

And the said Mary K. Sammis, being further examined seperate and apart from her said husband, did also acknowledge that she freely and voluntarily relinquished renounced all her dower and right and title of dower in and to the premises described without any compulsion, constraint, apprehension, or fear of or from her said husband, the said John S. Sammis.

Given under my hand at Jacksonville, in said county, the day and year aforesaid.

F. F. L. ENGLE,
Justice of the Peace in and for said County and State.

38 STATE OF FLORIDA,
County of Duval:

Be it remembered that on this 1st day of Nov., 1861, I, J. M. Daniel, clerk of the circuit court in and for the county and State above named, have duly recorded the foregoing deed in the public records of Duval County.

In witness whereof I have hereunto set my hand and affixed the seal of our said court.

[SEAL.] J. M. DANIEL, *Clerk.*

STATE OF FLORIDA,
County of Duval, ss:

I, Edwin Higgins, clerk of the circuit court in and for said county, hereby certify that the foregoing is a true copy of the original, recorded in book M, page 393, of the public records of said county.

Witness my hand and seal of said court this 20th day of November, A. D. 1876.

EDWIN HIGGINS, *Clerk.*

(Indorsed:) Certified copy of deed from John S. Sammis to Charles Willey, Jan'y 3d, 1857, put in evidence. Phil. Walter, cl'k, O. W. Bromwell, d'p'ty.

39 *U. S. marshal to John S. Sammis.—Deed.*

[U. S. revenue, 50c., cancelled.]

I, Joseph Remington, marshal of the United States for the northern district of Florida, to all persons to whom these presents shall come, greeting:

Whereas by a writ of venditioni exponas, issued out of the district court of the United States for the northern district of Florida, tested the second day of March, A. D. 1865, in a certain proceeding, judgment, sentence, and decree in rem in the said court, under and in pursuance of an act of Congress entitled "An act to confiscate property used for incendiary purposes," approved August 6, 1861, and between the United States, libellant, and all those certain lots of land situate in the city of Jacksonville, county of Duval, and State of Florida, known as water lot number five (5), also sixty-five feet of the easterly part of water lot number six (6), commencing at the corner of water lots number
40 five and six, on Bay street, running thence southerly along the line of said water lots five and six to the St. John's River; thence westerly, along the line of said St. John's River, sixty-five feet; thence northerly, on a line parallel with a line dividing said lots five and six, to Bay street; thence easterly, along said Bay street sixty feet, to the beginning; late the property and estate and effects of Charles Willey, I, the said marshal, was commanded to cause the said lots of land to be sold in manner and form, and upon the notice of law required, to the highest bidder, and to execute to the purchaser or purchasers thereof such deed or deeds of bargain and sale as shall fully and effectually vest in the purchaser or purchasers of said lots of land a good and valid title thereto in fee simple; Whereas I, the said marshal, in obedience to, and in
41 pursuance of, the said writ of venditioni exponas, and after having given due, timely, and legal notice of the time and place of sale, did, on the seventeenth day of April, A. D. 1865, expose the said lots of land to sale by public vendue or outcry, and sold the same to John S. Sammis, of the city of Jacksonville, county of Duval, and State of Florida, for the sum of two hundred dollars, he being the highest bidder, and that being the highest and best sum bidden for the same:

Now, know all men by these presents that I, Joseph Remington, marshal as aforesaid, for and in consideration of the said sum of two hundred dollars, to me in hand paid by John S. Sammis at and before the ensealing and delivering of these presents, the receipt whereof I do hereby acknowledge, have granted, bargained, sold, aliened, enfeoffed,
42 conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, convey, and confirm unto the said John S. Sammis, and to his heirs and assigns, all the said lots of land above described and hereby conveyed, or mentioned, or intended so to be, together with the buildings and improvements thereon, and the rights, liberties, privileges, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the revisions, remainders, rents, issues, and profits thereof, to have and to hold the said lots of land above described and the hereditaments and appurtenances unto the said John S. Sammis, his heirs and assigns, to and for the only proper use of the said John S. Sammis, his heirs and assigns, forever.

In witness whereof I, the said John S. Sammis, have hereunto

43 set my hand and seal this seventeenth day of April, in the year of our Lord one thousand eight hundred and sixty-five.

JOSEPH REMINGTON,
Marshal.

Sealed and delivered in presence of—
I. C. GREELEY,
A. L. HALLOWAY.

STATE OF FLORIDA,
County of Duval:

Be it known that on this 25th day of January, A. D. 1866, before me, clerk of the circuit court for said county, personally came J. C. Greeley, one of the subscribing witnesses to the foregoing deed, and acknowledged in due form of law that he saw Joseph Remington, U. S. marshal, sign, seal, and deliver the same for the purpose therein mentioned; wherefore, on said day, I have duly recorded the same in the public records of said county.

Witness my hand and the seal of said court the day and year above written.

44 [SEAL.] M. HEARN, *Clerk.*

STATE OF FLORIDA,
County of Duval:

I, clerk of the circuit court in and for said county, do hereby certify that the foregoing is a true copy of the original from the records of my office.

Witness my hand and the seal of said court this sixth day of May, A. D. 1878.

[SEAL.] T. E. BUCKMAN, *Clerk.*

(Indorsed:) Deed. U. S. marshal to John S. Sammis. Certified copy, book M., page 723, read in evidence.

45 In the U. S. circuit court, northern district of Florida.

JOHN BUCKELL ET AL.
vs.
HELEN BROWARD. } Ejectment.

JOHN BUCKELL ET AL.
vs.
PETER JONES AND GEO. DE COTTES. } Ejectment.

The plaintiffs and defendants, by their attorneys, admit the following to be true, without the necessity of introducing evidence in proof thereof, that is to say:

The plaintiffs admit the regularity of all the proceedings in the confiscation suit in the district court for the northern district of Florida against the property of Chas. Willey, and that there was a decree of condemnation & sale of said property. The defendants on are not required to introduce certified copies of such proceeding or the original papers, and that John S. Sammis was the purchaser at confiscation sale.

The defendants on their part admit that Francis E. Yale and
46 Mary Buckell are the children and only heirs at law of Charles Willey, and that the lands in controversy are the same lands

which the defendants were in possession of at the date of the service of summons in said suits of ejectment.

A. DAGGETT & C. P. COOPER,
Att'ys for John Buckell.
FRANCIS E. YALE & MARY BUCKELL.
J. C. MARCY, *Att'y for D'f't.*

JACKSONVILLE, *May* 10, 1878.

(Indorsed:) U. S. circuit court, northern district of Florida. Buckell et al. vs. Jones et al. Agreement of counsel. Filed May 10, 1878. P. Walker, clerk, O. W. Bromwell, d'p'ty.

47 United States circuit court, 5th judicial circuit, northern district of Florida.

MAY 10TH, 1878.

Court met pursuant to adjournment.
Present, the honorable Thomas Settle, judge.
Court opened in due form by the crier.

* * * * * * *

JOHN BUCKELL ET AL. }
vs. } Ejectment.
PETER JONES ET AL. }

This cause being called for a hearing, and the argument of counsel continuing to a late hour, it was ordered that the case be continued until to-morrow.

Ordered that this court do adjourn until to-morrow morning at 10 o'clock.

SATURDAY MORNING, *May* 11*th*, 1878.

Court met pursuant to adjournment.
Present, the honorable Thomas Settle, judge.
Court was opened in due form by the crier.

JOHN BUCKELL ET AL. }
vs. } Ejectment.
PETER JONES ET AL. }

This cause coming on to be heard this day the following jury
48 were empannelled and sworn to well and truly try the issue joined, to wit: W. H. Christy, John H. Anderson, W. T. Rose, Enos Wasgate, T. S. Wilmoth, M. F. Swaim, Jeremiah Follansbee, R. N. Ellis, Wm. H. Kendrick, John F. Tyler, A. B. Campbell, Geo. C. Wilson.

Argument of counsel not being concluded at the hour of adjournment, it is ordered that this court do now adjourn until Monday morning at 10 o'clock.

MONDAY MORNING, *May* 13*th*, 1878.

Court met pursuant to adjournment.
Present, the honorable Thomas Settle, judge.
Court was opened in due form by the crier.

JOHN BUCKELL ET AL. }
vs. } Ejectment.
PETER JONES ET AL. }

This cause coming on again to be heard this day, and the jury here-

tofore empannelled & sworn in this cause answered to their names, as follows: Wm. H. Christy, John H. Anderson, W. T. Rose, Enos Wasgate, T. S. Wilmath, M. F. Swaim, Jeremiah Follansbee, R. N. Ellis, Wm. H. Kendrick, John F. Tyler, A. B. Campbell, Geo. C. Wilson.

The evidence being concluded and the argument of counsel, and
49 the jury having been charged by the court, retired in charge of a sworn bailiff.

After mature deliberation, the jury returned into court with the following verdict:

We, the jury, find the defendants guilty and assess the plaintiffs' damages as mesne profits at $932.50.

* * * * * * *

Ordered that this court do now adjourn until to-morrow morning at 10 o'clock.

U. S. circuit c't.

JOHN BUCKELL ET AL. }
vs. } Ejectment.
PETER JONES ET AL. }

And now, May 15, '78, defendants moves the court for a new trial in above cause—

1st. For the reason that the charge to the jury erroneous and against the law, in this, that the fee-simple purported to be conveyed by deed of U. S. marshal to John S. Sammis only conveyed a life estate, and that the court exceeded its jurisdiction.

2nd. General errors.

J. C. MARCY.
Of Counsel for Def'ts.

A. DOGGETT, Esq'r.
CHAS. CORPER, Esq'r.

Motion denied.

P. WALTER, *Clerk.*

50 Counsel for def'ts request following instructions:

U. S. court.

HEIRS OF CHARLES WILLEY }
vs. } Action in ejectment.
TENENTS OF W. S. WHITLOCK. }

The defendants request the court to charge the jury:

1st. That the act of Congress passed August 6th, 1861, is constitutional and in full and binding force.

Second. That a confiscation of property under said act of Congress and in pursuance of its provisions, decrees made, and sales had, is good and valid and can only be reviewed by writ of error or appeal.

Third. That a sale of reality under & in pursuance of acts of Congress passed Aug. 6, '61, carries with it all the title of owner without any reservation of interest whatever to heirs or any one else, that is, if he held a life estate, that passed to the vendee; if, in fee-simple, then a title in fee-simple passed to the vendee, subject, of course, to all liens existing at time of seizure of offending property.

51 5th. That the record in confiscation case No. 36, entitled "United States vs. Lot of Land in Jacksonville, Charles Willey, owner," shows a good title in fee-simple to the vendee at sale under venditioni exponas issued in above cause.

6th. That the acts of '61 & '62 are essentially different: acts of '61 enforcing confiscation of property for the reason that the property itself had been used or employed for confederate purposes; acts of '62 enforcing confiscation for the reason that the individual was the offender and his property seized for two reasons: first, that the enemy should not have the benefit of it; second, as a punishment to the offender.

(Indorsed:) Heirs of Chas. Willey vs. Whitlock. Instructions to jury. Filed May 13, 1878. Philip Walter, clerk, O. W. Bromwell, dep'ty.

52 JOHN BUCKELL ET AL. vs. PETER JONES ET AL. } Ejectment.

The court instructs the jury.

1st. That the act of Congress passed August 6, 1861, is constitutional and in full force.

2nd. That a confiscation of property under said act of Congress and in pursuance of its provisions is good and valid, and can only be reviewed by writ of error or appeal, provided the court does not exceed its jurisdiction, and for instance sell a fee-simple when it can only sell a life estate.

3rd. That a sale of realty under and in pursuance of the said act of Congress passed August 6, 1861, carried with it all the title of the owner without any reservation of interest whatever to him or to any one else, subject of course to all existing leins at the time of seizure of the property.

4th. That the act of Congress of August 6, 1861, was an exercise of belligerent rights and entirely within the scope and authority of Congress.

53 5th. That the acts of 1861 and 1862 are different; the act of 1861 enforcing confiscation of property for the reason that the property itself had been used or employed for confederate purposes; the act of 1862 enforcing confiscation for the reason that the individual was the offender and his property seized for two reasons: first, that the enemy should not have the benefit of it; second, as a punishment of the offender. But both acts made knowledge and consent of the owner a necessary ingredient to confiscation. This much is said in response to the prayer for special instructions in behalf of the defendants.

The learned counsel, by an agreement filed in the case, have reli'ved us of much trouble. This case is presented: Charles Willey, the owner of the lot in question, consented to its being used in aid of the rebellion. It was confiscated and sold, and a deed made to purchaser which purported to pass the fee-simple. Charles Willey died in 1875, and his heirs now come forward and claim the property described in the declaration.

54 Purchasers at judicial sales can only take such interest and title as it was in the power and jurisdiction of the court directing the sale to give.

The acts of 1861 and 1862, though differing in some respects, are in

pari materia; while the one treats of property, the other of the person, both are on account of the acts of the person offending. The Armstrong foundry case shows that you cannot proceed against the offending thing without coupling with it the guilty knowledge and consent of the person, and that the pardon of the offender absolved the property as well as the person.

Upon the review of the whole case the court charges you that the condemnation sale of the lot in question, purporting to convey a fee-simple, only conveyed an estate for the life of Charles Willey, and that the heirs of the said Chas. Willey are entitled to recover the same.

THOMAS SETTLE, *Judge.*

55 *Judgement.*

JOHN BUCKELL & MARY E. BUCKELL
vs.
PETER JONES ET AL. } In ejectment.

And now on this 13th day of May, one thousand eight hundred and seventy-eight, comes the plaintiffs by their attorney, and it appearing to the court that the defendants had filed their pleas, and the issue being joined, whereupon came a jury to try the issue, to wit:

Wm. H. Christy, John H. Anderson, Wm. T. Rose, Enos Wasgate, T. S. Wilmuth, M. F. Swaim, Jerremiah Follansbee, R. N. Ellis, Wm. H. Kendrick, John F. Tyler, A. B. Campbell, Geo. C. Wilson, who being duly sworn to try the issue, joined upon their oath, do say: We, the jury, find for the plaintiffs John Buckell and Mary E. Buckell, and that the defendants Peter Jones & George L. De Cotts are guilty of the ejectment and trespass as alleged in the declaration.

Now, therefore, it is considered and ordered by the court that
56 the plaintiffs John Buckell & Mary E. Buckell do have & recover of and from the defendants Peter Jones & George L. De Cotts, according to the finding of the jury, the possession of the premises mentioned in the declaration filed in this action with all the tenements thereunto belonging, and the sum of $932.50 for mesne profits, and the further sum of 42.87 for costs in this behalf expended.

And it is further considered and ordered by the court that the writ of this court do issue directed to the marshal of the United States for the northern district of Florida, to cause the said John Buckell & Mary E. Buckell to have possession of the said premises according to the force, form, & effect of their said recovery.

At which time in open court defendants, by their counsel, gave notice of appeal.

57 In the circuit court of the United States for the 5th judicial circuit, northern district of Florida.

Know all men by these presents that we, William S. Whitlock, D. B. Whitlock, J. H. Norton, John S. Driggs, C. P. Devereaux, & John S. Sammis, are held and firmly bound unto John Buckell, Mary E. Buckell, and Francis Yale, in the sum of four thousand ($4,000) dollars lawful money of the United States, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Signed and sealed this 10th day of July, A. D. 1878.

The condition of this obligation is such that whereas the said John Buckell, Mary E. Buckell, and Francis Yale, on the 15th day of May, A. D. 1878, in the circuit court of the United States, 5th judicial circuit northern district of Florida, held at Jacksonville, Florida, recovered a judgment against the said Peter Jones et al. and Wm. S. Whitlock, in an action of ejectment with mesne profits, assessed at nine hun-
58 dred and thirty-two (932) dollars, and the said Peter Jones et al. and Wm. S. Whitlock, being dissatisfied with said judgment and having prayed for and obtained a writ of error to the next term of the Supreme Court of the United States to be held at Washington, D. C.: Now, if the judgment of the said circuit court be affirmed, we bind ourselves to pay the amount of said judgment, with the accrued mesne profits thereon, then this obligation to be void or else to remain in full force and virtue.

WM. S. WHITLOCK. [SEAL.]
D. B. WHITLOCK. [SEAL.]
J. H. NORTON. [SEAL.]
JOHN S. SAMMIS. [SEAL.]
JOHN S. DRIGGS. [SEAL.]
C. P. DEVERAUX. [SEAL.]

Taken and acknowledged by Wm. S. Whitlock & D. B. Whitlock before me.

[SEAL.] EDWARD L. OWEN.
U. S. Commissioner for the South'n Dist. of New York.

Witness present as to John S. Sammis & C. P. Deveraux:
J. C. MARCY.
H. JENKIN, Jr.

Southern District of New York:

Daniel B. Whitlock, being duly sworn, says that he resides in New York City, and that he is worth over and above all his debts and liabilities the sum of eight thousand dollars.

D. B. WHITLOCK.

59 Subscribed & sworn to before me this 19th day of July, 1878.
[SEAL.] EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

(Indorsed:) Bond of def'ts to pl'ffs. Buckell et al. vs. Peter Jones et al. Approved and filed July 23rd, 1878. P. Walter, clerk.

60 Supreme Court of the United States.

PETER JONES AND GEORGE L. DE COTTES, tenants, and William S. Whitlock, owner and claimant of premises, plaintiffs in error,
against
JOHN BUCKELL AND MARY E. BUCKELL, defendants in error.

Know all men by these presents that we, William S. Whitlock, of Montrose, New Jersey, Daniel B. Whitlock, of the city, county, and State of New York, and W. H. Gleason, of the village of Biscayus, State of Florida, and Florentio M. Huertas, of the city of Jacksonville, State of Florida, sureties, are held and firmly bound unto said

John Buckell and Mary E. Buckell, above named, in the sum of three hundred dollars, to be paid to the said John Buckell and Mary E. Buckell, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly
61 and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated the 21st day of January, A. D. 1879.

Whereas the above-named John Buckell and Mary E. Buckell, on the 15th day of May, 1878, recovered a judgment in the circuit court of the United States for the northern district of Florida in the fifth judicial circuit against the above-named Peter Jones and George L. De Cottes, tenants, and William S. Whitlock, owner and claimant of premises, in an action of ejectment, awarding them possession of the premises mentioned and described in the declaration in said action, with the tenements thereunto belonging, and for nine hundred and thirty-two dollars and fifty cents ($932.50) mesne profits, and forty-two dollars and eighty-seven cents ($42.87) costs, and the said Peter Jones and George L. De Cottes and William S. Whitlock, feeling aggrieved thereby, intend and are about to apply to the Supreme Court of the United States for a writ of error to reverse said judgment:

Now, the condition of this obligation is such that if the above-
62 named Peter Jones and George L. De Cottes and William S. Whitlock, having procured their said writ of error, shall prosecute the same to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WM. S. WHITLOCK. [SEAL.]
D. B. WHITLOCK. [SEAL.]
W. H. GLEASON. [SEAL.]
FLORENTIO M. HUERTAS. [SEAL.]

Signed and sealed as to William S. Whitlock & Daniel B. Whitlock in presence of—

EDWARD L. OWEN.
A. R. MEEK, as to W. H. G. & W. H. G.
J. B. C. DREW, do. do. do. do.

STATE OF NEW YORK,
County of New York, City of New York, ss:

On this 21st day of January, A. D. 1879, before me personally appeared William S. Whitlock, who is to me personally known and known to me to be the individual described and mentioned in the foregoing bond by that name, and who executed the same, & acknowledged to me that he executed the same for the purposes therein expressed.

[OFFICIAL SEAL.] EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

STATE OF NEW YORK,
County of New York, City of New York, ss:

On this 21st day of January, A. D. 1879, before me personally
63 appeared Daniel B. Whitlock, who is to me personally known, and known to me to be the same individual mentioned in the foregoing bond by that name and who executed the same, and acknowledged to me that he executed the same for the purposes therein expressed, and being by me duly sworn, makes oath & says that he resides at the city of New York, county of New York, in said State, and is a free-

holder in said State; that he is worth the sum of six hundred dollars over all his debts and liabilities and exclusive of property exempt by law from levy and sale under execution.

D. B. WHITLOCK.

Subscribed & sworn to before me this 21st day of January, 1879.
[SEAL OF OFFICE.] EDWARD L. OWEN,
U. S. Commissioner for the Southern District of New York.

STATE OF FLORIDA,
County of Duval, City of Jacksonville, ss:

On this 27th day of Jan'y, A. D. 1879, before me personally appeared W. H. Gleason, who is to me personally known, and known to me to be the same individual mentioned in the foregoing bond by that name and who executed the same, and acknowledged to me that he
64 executed the same for the purposes therein expressed, and being by me duly sworn, makes oath & says that he resides at Biscayno, State Florida, in said State, and is a real estate holder in said State; that he is worth the sum of five hundred dollars over all his debts and liabilities, and exclusive of property exempt by law from levy and sale under execution.

W. H. GLEASON.

Sworn to before me this 27th day of January, 1879.
[OFFICIAL SEAL.] A. R. MEEK,
U. S. Com'r North'n Dist. of Florida.

STATE OF FLORIDA,
County of Duval, City of Jacksonville, ss:

On this 27th day of January, A. D. 1879, before me personally appeared Florentio M. Huertas, who is to me personally known, and known to me to be the same individual mentioned in the foregoing bond by that name, and acknowledged to me that he executed the same for the purposes therein expressed, and being by me duly sworn,
65 makes oath & says that he resides at Jacksonville, in said State, and is a real estate holder in said State; that he is worth the sum of five hundred dollars over all his debts & liabilities and exclusive of property exempt by law from levy and sale under execution.

FLORENTIO M. HUERTAS.

Sworn to before me this 27th day of January, 1879.
[OFFICIAL SEAL.] PHILIP WALTER,
Clerk U. S. Circuit Court Northern Dist. of Florida.

(Endorsed:) Supreme Court of the United States. Peter Jones et al., plaintiffs in error, ag'st John Bucknell & ano'r, defendants in error. Bond for costs of defendants in error. W. A. Beach, attorney for pl'ffs in error, 120 Broadway, N. Y. City. Approved by
(Signed) JOS. P. BRADLEY,
Asso. Justice Sup. Ct. U. S.

66 UNITED STATES,
Northern District of Florida, ss:

Personally appeared before me J. C. Marcy, who, being duly sworn, deposes and says that he is well acquainted with the property in question and familiar with its value; that the value of the said property is over ten thousand dollars ($10,000); that he knows the said property

to be the same property for which action of ejectment is brought in above entitled action.

J. C. MARCY.

Sworn and subscribed before me this Sept. 3d, '78.
[SEAL.] PHILIP WALTER, *Clerk.*

67 *Bill of exceptions filed by defendant for writ of errors to U. S. Supreme Court.*

5th judicial circuit, northern district of Florida.

JOHN BUCKELL & MARY BUCKELL
vs.
PETER JONES AND GEORGE S. DE COTTES, tenants, & William S. Whitlock, owner and claimant of premises. } Ejectment.

Cause removed from circuit court of Duval County, Florida, to U. S. circuit court.

Be it remembered that at a term of the circuit court of the United States held for the northern district of Florida, in the fifth judicial circuit, held at the city of Jacksonville on the tenth day of May (being a continuation of the December term for said judicial circuit), in the year of our Lord one thousand eight hundred and seventy-eight, a cause therein pending, wherein John Buckell and Mary E. Buckell were plaintiffs, and Peter Jones and George L. De Cottes (tenants)
68 and William S. Whitlock, claimant, defendants, came on to be heard before his honor Thomas Settle, sitting as circuit judge of said circuit court, at which day came the said parties by their respective attorneys. And thereupon the said issues in manner aforesaid joined between the said parties came on to be tried, and the jurors of the jury aforesaid, whereof mention is within made, being called, likewise came, and were sworn to try the said issues in manner aforesaid joined, and thereupon the plaintiffs and defendants offered their respective proofs, and were heard by the said court in argument and by the said jury aforesaid. Whereupon the said judge, the said parties having concluded and submitted their testimony and the several matters aforesaid, did then and there give his opinion and deliver his charge to the jury (inter alia), that "the acts of 1861 and 1862,
69 though differing in some respects, are in part materiai; while the one treats of property, the other of the person, both are on account of the acts of the offending. The Armstrong foundry case shows that you cannot proceed against the offending thing without coupling with it the guilty knowledge and consent of the person, and that pardon of the offender absolved the property as well as the person. Upon review of the whole case, the court charges you that the condemnation and sale of the lot in question, purporting to convey a fee-simple, only conveys an estate for the life of Charles Willey, and that the heirs of the said Charles Willey are entitled to recover the same."

To which said opinion and said portion of the charge of the court the said defendant, by his attorney, did then and there except. And the said judge, under the charge and with the directions aforesaid, submitted the said issue and the evidence so given on the
70 said trial to the jury, and the jury aforesaid then and there gave

their verdict for the said plaintiffs, and found the defendants guilty, and assessed the damages at nine hundred and thirty-two $\frac{50}{100}$ dollars ($932.50).

And the said defendants, by their attorney, then and there at the term of the court aforesaid did enter in writing and submit to the said court his motion that the said verdict be set aside and that a new trial be granted for reasons following, viz:

"1st. For the reason that the to the was erroneous and against the law in this, 'that the fee simple purported to be conveyed by deed of U. S. marshal to John S. Sammis only conveyed a life estate,' and that the court exceeded its jurisdiction."

"2nd. General errors."

71 And the said motion coming on to be heard on the 15th of May, aforesaid, at the term aforesaid, the said court did consider and decide that the said motion should not be granted, to which decision the said defendants, by their attorney, did then and there except. Whereupon the court aforesaid, on the said 15th of May aforesaid, at term aforesaid, did render judgment in favor of plaintiffs, and found defendants guilty and assessed the damages at 932.50 dollars and costs of suit as appears of record.

And inasmuch as the said several matters objected to or insisted upon and considered by the court do not appear by the record of the verdict and judgment aforesaid, the said defendants, by their counsel aforesaid, did then and there, at the term aforesaid, propose this their bill of exceptions to the said opinion, charge,

72 and decisions of the said judge and request him to sign the same according to the rules and statutes and acts of Congress in such case made and provided, which is done this 27th day of May, A. D. 1878, under my hand and seal.

[SEAL.] THOMAS SETTLE, *Judge.*

73 (*Original.*)

Supreme Court of the United States of October term in the year of our Lord one thousand eight hundred and seventy-nine.

PETER JONES AND GEORGE L. DE COTTES, tenants, and William S. Whitlock owner and claimant of premises, plaintiffs in error,
against
JOHN BUCKELL AND MARY E. BUCKELL, defendants in error.

Afterwards, to wit, on the 2nd Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the capitol in the city of Washington, came the said Peter Jones and George L. De Cottes, tenants, and William S. Whitlock, owner and claimant of premises, by William A. Beach, their attorney, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That upon the trial at the circuit the learned judge erred in his instructions to the jury that "the acts of 1861 and 1862, though differing in some respects, are in pari materia: while the one

74 treats of property, the other of the person, both are on account of the acts of the person offending. The Armstrong foundry case shows that you cannot proceed against the offending thing without

coupling with it the guilty knowledge and consent of the person, and that the pardon of the offender absolved the property as well as the persons. Upon the review of the whole case the court charges you that the condemnation and sale of the lot in question, purporting to convey a fee-simple, only conveyed an estate for the life of Charles Willey, and that the heirs of the said Charles Willey are entitled to recover the same;" whereas he should have charged that the condemnation and sale of the lot in question purporting to convey a fee-simple did in law convey a fee-simple, and that the heirs of Charles Willey were not entitled to recover the same.

Second. That the said learned judge erred in refusing the motion made at the trial term for a new trial; whereas he should have granted such motion for the reasons stated therein upon the record.

Third. That the third instruction of the said learned judge to
75 the jury given in answer to the prayer of the defendants is inconsistent with that portion of his charge which instructed the jury "that the condemnation and sale of the lot in question purporting to convey a fee-simple only conveyed an estate for the life of Charles Willey."

Fourth. That the said learned judge erred in his charge to the jury on said trial wherein he instructed them "that the heirs of the said Charles Willey were entitled to recover the lot in question;" whereas he should have stated that they were not entitled to recover the same.

And the said Peter Jones, George L. De Cottes and William S. Whitlock, plaintiffs in error, pray that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

W. A. BEACH,
Attorney for Plaintiffs in Error.

(Indorsed:) Supreme Court of the United States. Peter Jones et al. plaintiffs in error, against John Buckell & ano., defendants in error. Original assignment of error. W. A. Beach, attorney for pl'ffs in error, 120 Broadway, N. Y. Filed April 25, 1879. Philip Walter, clerk.

76 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Florida, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, or some of you, between John Buckell and Mary E. Buckell, plaintiffs, and Peter Jones, George L. De Cottes, and William S. Whitlock, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being

inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fifteenth day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

(Indorsed:) Filed April 25, 1879. Philip Walter, clerk.

77 The United States of America to John Buckell and Mary E. Buckell, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern district of Florida, wherein Peter Jones, George L. De Cottes, and William S. Whitlock are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this fifteenth day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

JOSEPH P. BRADLEY,
Associate Justice Sup. Court U. S.

78 On this twenty-fourth day of April, in the year of our Lord one thousand eight hundred and seventy-nine, personally appeared James L. Banks, deputy U. S. marshal before me, the subscriber, a clerk of the United States circuit court, and makes oath that he delivered a true copy of the within citation to Arristodes Doggett, esq., attorney for John Buckel and Mary E. Buckel his wife, at Jacksonville, within the northern district of Florida, on this 24th day of April, A. D. 1879.

JAMES L. BANKS.

Sworn to and subscribed the 24th day of April, A. D. 1879.

[SEAL.] PHILIP WALTER,
Clerk U. S. Circuit Court.

(Indorsed:) In the U. S. circuit court, northern district Florida. Peter Jones, George L. De Cottes, and William S. Whitlock vs. John Buckell and Mary E. Buckell. Original citation. Filed April 25, 1879. Philip Walter, clerk.

79 Circuit court of the United States for the northern district of Florida in the fifth judicial circuit.

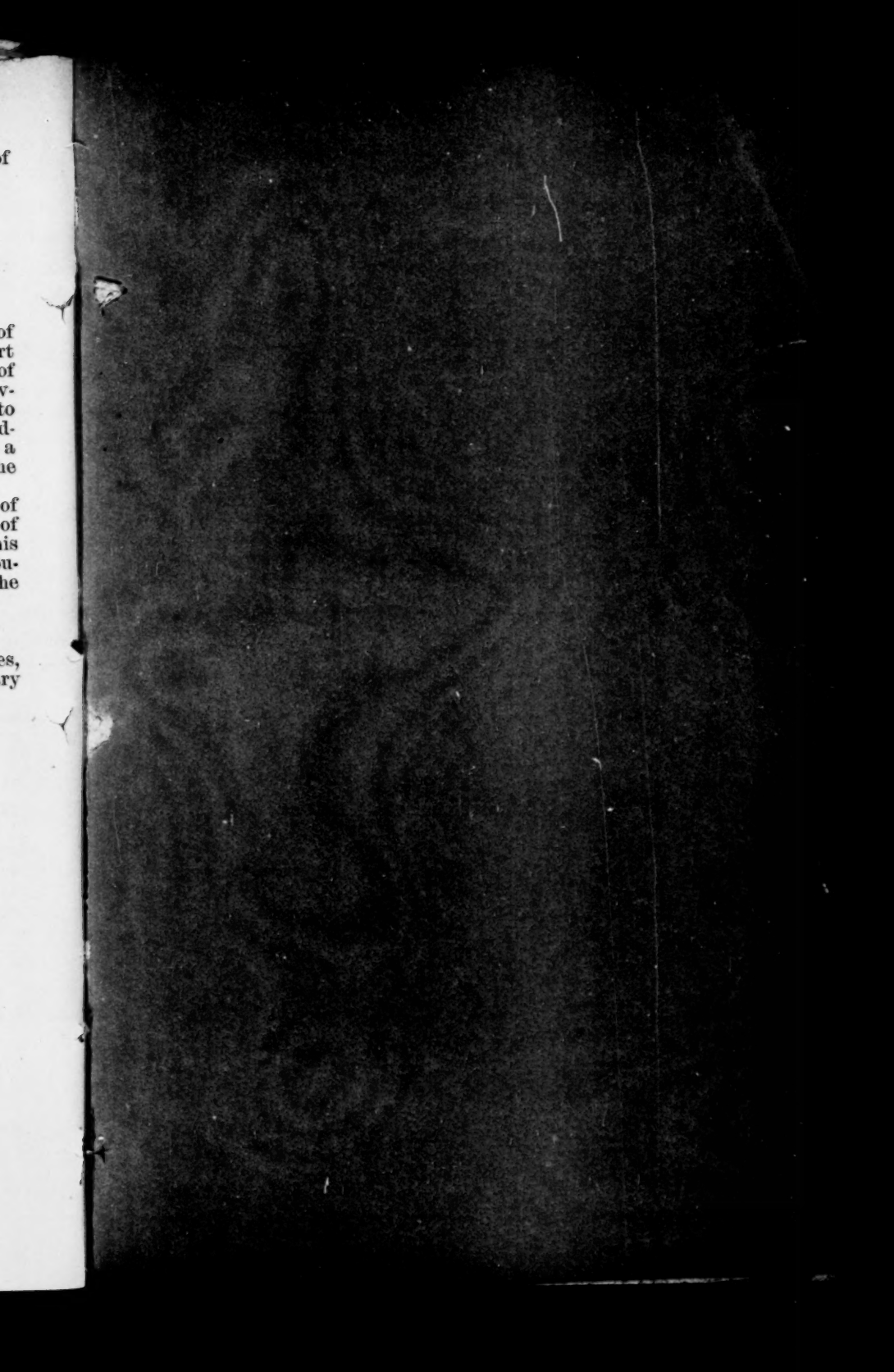
JOHN BUCKELL AND MARY E. BUCKELL
vs.
PETER JONES AND GEORGE L. DE COTTES, tenants, and William S. Whitlock, owner and claimant of premises.

I hereby certify that the foregoing consists of the original writ of error removing the above-entitled cause from the above-named court tion the Supreme Court of the United States, the original assignment of errors and prayer for reversal, the original citation, with proof of service thereof, upon all the defendants in error therein named, and to whom the same is directed, and a transcript of the record and proceedings in said cause in said circuit court; and that said transcript is a true and correct transcript of said record and proceedings, and of the whole of the same.

In testimony whereof I hereunto set my hand an' affix the seal of said circuit court of the United States for the northern district of
80 Florida, at the city of Jacksonville and district aforesaid, this twenty-fourth day of April, in the year of our Lord the one thousand eight hundred and seventy-ninth, and of the Independence of the United States of America the one hundred and third.

[SEAL.] PHILIP WALTER, *Clerk.*

(Indorsement on cover:) No. 186, Peter Jones, George L. De Cottes, and William S. Whitlock, plaintiffs in error vs. John Buckell and Mary E. Buckell. N. Florida C. C. U. S. Filed 30th April, 1879.



SUPREME COURT OF THE UNITED STATES.

No. 186.

PETER JONES AND GEORGE L. DE COTTES, TENANTS, AND WILLIAM S. WHITLOCK, OWNER AND CLAIMANT OF PREMISES,

Plaintiffs in Error,

against

JOHN BUCKELL AND MARY E. BUCKELL,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

W. A. BEACH,

Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

No. 186.

PETER JONES and GEORGE L. DE COTTES, Tenants, and WILLIAM S. WHITLOCK, Owner and Claimant of Premises,
Plaintiffs in Error.

against

JOHN BUCKELL and MARY E. BUCKELL,
Defendants in Error.

The Case comes to this Court by Writ of Error to the Circuit Court of the United States, for the Northern District of Florida.

The Suit was instituted in the State Circuit Court. It was removed into the United States Circuit Court, and there tried. It was brought to recover a Parcel of Land on which there was a Steam Mill and Wharf, situated in the City of Jacksonville, Florida.

Plaintiffs below claimed as Heirs at Law of *Charles Willey*, Deceased. Defendants below deduced title through proceedings under the Confiscation Act of August 6th, 1861.

William S. Whitlock defended the Action as owner. (Record, fol. 8). On the Trial it was admitted, in writing, that all the proceedings in the Confiscation Suit in the Northern District of Florida were regular, resulting in a Decree of condemnation and sale of the Real Estate mentioned in the Pleadings, and that *John S. Sammis* became the purchaser at the Sale. Proof of those proceedings was waived. The Defence admitted, that *Francis E. Yale and Mary E. Buckell* were the children and only Heirs at Law of *Charles Willey*. (Record, fol. 46).

By the Deed from *Joseph Remington*, U. S. Marshal, Lot Five in the City of Jacksonville, and sixty-five feet of the Easterly part of Lot Six were sold and conveyed to *John S. Sammis*, under a Decree *in rem*, and a Writ of *Venditioni exponas*, entered and issued out of the District Court of the United States

for the Northern District of Florida. (Record, fol. 39.) The written stipulation proven on the Trial gives full effect to the Decree of condemnation, and sale under it, vesting title in *John S. Sammis*. Whether he took a fee or an Estate for the Life of *Charles Willey*, seems to have been the main contest on the Trial.

Defendants requested the Court to Charge the Jury, among other things, that a Sale under the Act of August 6th, 1861, carried the entire title:—And that the said Confiscation Record exhibited a good title in fee simple in the purchaser under the said Writ. (Record, fol. 50).

The Court below while maintaining the Act of August 6th, 1861, and the Decree of Condemnation and Sale, instructed the Jury, as matter of Law, that the "Condemnation Sale of the Lot in question, purporting to convey a fee simple, only conveyed an Estate for the life of *Charles Willey*," and that his Heirs were entitled to recover. (Record, fol. 54.) Under this instruction, the Jury found a Verdict for Plaintiffs and assessed Damages at $932.50. (Record, fols. 49, 69).

Defendants moved for a New Trial on the ground of Error in the instruction, that the purchaser under said Condemnation Decree and Sale, took only a Life Estate. The Motion was denied. (Record, fols. 49, 70).

Judgment was entered May 15th, 1878, that *John Buckell* and *Mary E. Buckell* have possession of the Premises with $932.50, *mesne* profits, and $42.87 Costs. (Record fols. 55, 71.)

May 27th, 1878, Bill of Exceptions was tendered by Defendants and signed and sealed. (Record, fol. 72.) Bond was duly approved and filed July 23d, 1878. (Record, fol. 60.) April 25th, 1879, Writ of Error with Citation and proof of service was filed. (Record, fol. 76.) Affidavit to the value of the Property in question, as exceeding $10,000 was filed. (Record, fol. 66.)

The original Assignment of Errors filed at the October Term, 1879, (Record, fol. 73.) specified as Error:—

"*First.*—That upon the Trial at the Circuit the learned Judge erred in his instructions to the Jury, that "the Acts of 1861 and 1862, though differing in some respects, are in *pari materia;* while the one treats of property, the other of the person, both are on account of the acts of the person offending. The Armstrong foundry case shows that you cannot proceed against the offending thing without coupling with it the guilty knowledge and consent of the person, and that the pardon of the Offender absolved the Property as well as the person. Upon the review of the whole Case the Court charges you that the condemnation and sale of the Lot in question, purporting to convey a fee simple, only conveyed an Estate for the life of Charles Willey, and that the Heirs of the said Charles Willey are entitled to recover the same;' whereas he should have charged that the condemnation and sale of the Lot in question pur-

porting to convey a fee simple did in law convey a fee simple, and that the Heirs of Charles Willey were not entitled to recover the same.

"*Second.*—That the said learned Judge erred in refusing the Motion made at the Trial Term for a New Trial; whereas he should have granted such Motion for the reason stated therein upon the Record.

"*Third.*—That the third instruction of the said learned Judge to the Jury, given in answer to the prayer of the Defendants, is inconsistent with that portion of his Charge which instructed the Jury 'that the condemnation and sale of the Lot in question, purporting to convey a fee simple, only conveyed an Estate for the life of Charles Willey.'

"*Fourth.*—That the said learned Judge erred in his Charge to the Jury on said Trial, wherein he instructed them 'that the Heirs of the said Charles Willey were entitled to recover the Lot in question;' whereas he should have stated that they were not entitled to recover the same."

The same errors are reassigned. It is supposed that the Fourth Error assigned presents the entire question to be discussed.

The Court will be pleased to observe; that the Plaintiffs below are *John Buckell and Mary E. Buckell.* The Record does not disclose how *John Buckell* becomes connected with the title. The stipulation states *Francis E. Yale and Mary Buckell* to be the only Heirs at Law of *Charles Willey.*—How *John and Mary Buckell* are related does not appear. It is not therefore perceived upon what ground *John Buckell* was permitted to recover.

Again—By the stipulation, *Francis E. Yale*, was equally entitled with *Mary Buckell.* Yet *John and Mary Buckell* recovered possession of the entire Realty and *mesne profits.*

It is observable also, that title in *Charles Willey* prior to the confiscation is not affirmatively shown. Several Deeds to him were introduced, but of themselves they did not vest title. No ancillary evidence of possession with claim of title was given.

Unless, therefore, Defendants are estopped by the confiscation proceedings from setting up want of title in *Charles Willey*, the Plaintiffs showed no right.

Nor did the Defendants deduce title under the Confiscation Decree. Their Defense seems to have rested upon possession. The Declaration in the Suit charges them with possession, and the Stipulation admits their possession, at its commencement. (Record—fol. 46.) Nothing, therefore, prevents Defendants from defending upon the foot of their possession against Plaintiffs, showing no title. It is only by the charge of the Court, (fol. 53) that the death of *Willey* is shown.

The Deeds to Willey purport to convey the whole of Lots 5 and 6, except the North-west Corner Plot of Lot 6, marked A on annexed diagram, as follows:

1836, May 21.—Hammond Libby to Charles Willey,—conveys W. ½ of Lot 5, to wit; Plot marked E on annexed diagram. (Record, p. 6).

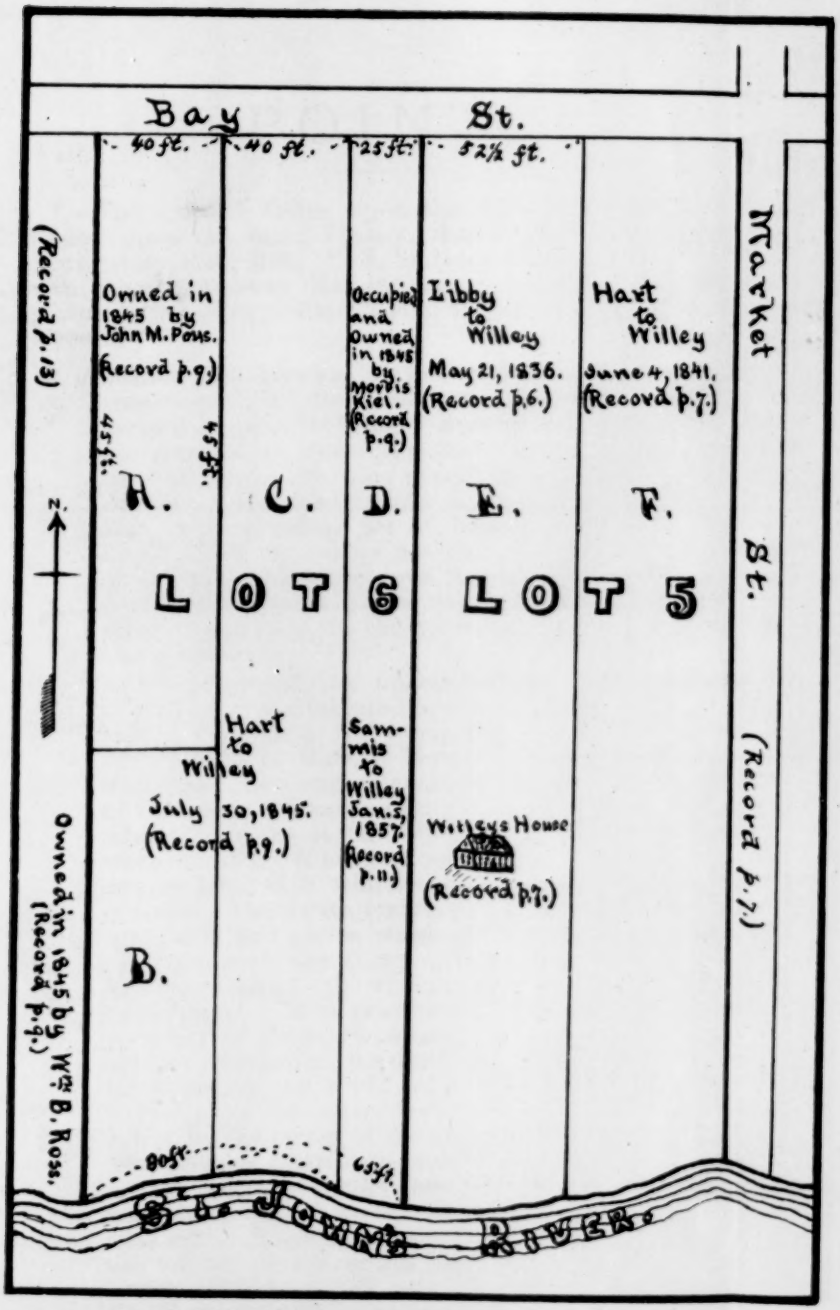
1841, June 4.—Isaiah D. Hart to Charles Willey,—conveys E. ½ of Lot 5, to wit; Plot marked F on annexed diagram. (Record, p. 7).

1845, July 30.—Isaiah D. Hart to Charles Willey,—conveys Plots marked B and C on annexed diagram described as being the whole of Lot 6, except North-west Corner Plot marked A on annexed diagram, and except also the Easternmost strip of 25 feet, marked D on annexed diagram. (Record, p. 9).

Charles S. Sammis to Charles Willey,—conveys said Easternmost strip of Lot 6, marked D on annexed diagram. (Record, p. 11).

1865, April 17.—Joseph Remington (U. S. Marshal) to John S. Sammis,—conveys whole of Lot 5, and 65 feet of Easterly part of Lot 6, being whole of Lots 5 and 6, except Plots marked A and B on the annexed diagram, and the same premises as described in Deeds to Charles Willey, except Plot marked B on annexed diagram. (Record, p. 13).

The Decree adjudged to the Defendants in Error the possession of part of Lot 5 and the whole of Lot 6, except the Plot marked A on annexed diagram. (Record, pp. 18, 2).


Bay St.
40 ft.
40 ft.
25 ft.
52½ ft.
Market St.
(Record p. 7.)
(Record p. 13)
Owned in 1845 by John M. Pons. (Record p. 9.)
Occupied and Owned in 1845 by Morris Kiel. (Record p. 9.)
Libby to Willey May 21, 1836. (Record p. 6.)
Hart to Willey June 4, 1841. (Record p. 7.)
45 ft.
45 ft.
R.
C.
D.
E.
F.
LOT 6
LOT 5
Hart to Willey July 30, 1845. (Record p. 9.)
Sammis to Willey Jan. 5, 1857. (Record p. 11.)
Willeys House
(Record p. 7.)
B.
Owned in 1845 by Wm B. Ross. (Record p. 9.)
80 ft.
65 ft.
St. Johns River.

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POINTS.

I.—The learned Judge upon the Trial, seems to have proceeded upon the legal Theory, that the Act of Congress approved July 17th, 1862, (U. S. Statutes at large, V. 12. p. 589.) with the explanatory Resolution, (id. p. 627.) operated as a qualified Repeal or modification of the Act of August 6th, 1861. (Record, fol. 53.)

First.—These Acts are not incompatible. They have it is true a common ultimate purpose, and may be said in a general sense to be *in pari materia*:—Nevertheless they are directed to the suppression and punishment of distinct offences. The one specifically condemns and pursues property used in aid of insurrection:—The other aims at the personal act of Treason and "*armed rebellion.*" The one seeks not only to deprive insurrection of the material it employs in resistance to Law, but to condemn it to the public use of the Government. The other looks only to the personal offence of the Citizen and punishes it.

This is by no means an unsubstantial distinction,—especially when it is attempted to repeal a Statute by implication. To do this, the repugnancy must be irreconcilable. (Beals *v.* Hale, 4 How., 37-53.) There is no insuperable,—nor any antagonism between these two Acts of Congress. Whatever may be supposed to exist arises wholly from the declaratory Resolution, but that relates, more especially if not exclusively, to a provision of the Act of 1862 with which the enactment of 1861 has no concern. The latter embraces but two subjects,--property used and slaves employed in aid of insurrection. It deals with the thing. That of 1862 is more comprehensive, dealing only with the acts of persons and their punishment. In its provisions, it does operate upon the property of those who engage in armed rebellion, but only as punishment for a different offence than that contemplated by the Act of 1861. The learned Judge below, indeed, says, that under both Acts there must be personal action by the owner of the property condemned, but that circumstance creates no conflict between them. It may be granted, that under that of 1861 the owner must in some form assent to the unlawful employment of his property:—But it is still true, that under the Act of 1862 the nature of his action must be altogether different. Under the act of 1861, it may be permissive only:—Under that of 1862, it must be active, armed rebellion.

The Resolution supposed to create the repugnance between these Statutes reads as follows:

"*Resolved, by the Senate and House of Representatives of "the United States of America, in Congress assembled,* "That the provisions of the third clause of the fifth sec- "tion of 'An Act to suppress insurrection, to punish "treason and rebellion, to seize and confiscate the prop- "erty of rebels, and for other purposes,' shall be so con- "strued as not to apply to any act or acts done prior to "the passage thereof; nor to include any member of a "State Legislature, or Judge, of any State Court, who "has not, in accepting or entering upon his office, taken "an oath to support the Constitution of the so-called "'Confederate States of America;' nor shall any pun- "ishment or proceedings under said Act be so construed "as to work a forfeiture of the real estate of the offender "beyond his natural life."

Section Five of the Act of 1862, with its third subdivision, reads thus:

"Sec. 5. *And be it further enacted*, That, to insure the "speedy termination of the present rebellion, it shall be "the duty of the President of the United States to cause "the seizure of all the estate and property, money, "stocks, credits, and effects of the persons hereinafter "named in this section, and to apply and use the same "and the proceeds thereof for the support of the Army "of the United States, that is to say: * * * * * *

"*Thirdly.* Of any person acting as Governor of a State, "Member of a convention or Legislature, or Judge of any "Court of any of the so-called Confererate States of "America.

"*Fourthly.* Of any person who, having held an office of "honor, trust, or profit in the United States, shall here- "after hold an office in the so-called Confederate States "of America."

It is to be observed that the Act of 1861 condemns all property used for insurrectionary purposes, regardless of the ownership. It may belong to enemy or friend. The Act of 1862 applies only to rebels and condemns their property whether or not employed in aid of rebellion. This distinction very clearly indicates that the Act of 1862 does not include the subject matter of the Act of 1861. True, the consent of an owner to the employment of his property may be deemed an offence,—(*Armstrong's Foundry*, 6 Wal., 766.) but it is not giving aid and comfort within the Act of 1862. The whole structure of the Act shows, that it was intended to reach altogether a different subject and offence than that covered by the Act of 1861. If so the latter is not repealed.

The distinction between these two Acts, in purpose and policy, is very forcibly declared in the dissenting opinion of *Mr. Justice Field* in *Miller* v. *United States*, (11 Wallace, 321-2).

It is further observable that the Revision of the Statutes embodies the three first Sections of the Act of 1862, omitting the remainder, (U. S. R. S., §§ 5332, 5334). The omitted portions are therefore repealed. (id. §5596). The three first Sections of the Act of 1861, embracing all provisions except that relating to Slaves is embodied in the Revised Statutes, (§§ 5308-9-11). This indicates that the Act of 1861 was intended to be permanent. It, in terms, applies to property used in the then existing and "any future insurrection." The Act of 1862 was limited to the then present rebellion.

Besides, the Act of 1861, authorizes an informer to pursue confiscation proceedings, and secure half the property condemned. The Act of 1862 has no such feature.

In March, 1863, Congress amended the Act of August 6th, 1861, treating it as an existing enactment. (12U. S. Statutes at Large, p. 762).

These considerations seem to demonstrate, that it was not the intention of Congress to repeal the Act of 1861.

This Court has treated the Act of 1861 as operative, by upholding proceedings under it long subsequent to the passage of the Act of 1862, and the accompanying Resolution.

Union Ins. Co. vs. *United States*, 6 Wal. 759.

Second.—The Act of 1861 is not obnoxious to the Constitutional provision in relation to attainders and forfeitures for treason, nor to that other provision concerning seizure of property without due process of law.

By its terms the entire title to condemned property passes by a sale, according to its provisions. If it be not repealed by the Act of 1862, the Decree below can be sustained only upon the theory that the Act is unconstitutional. The learned Judge at the Trial held it "Constitutional and in full force." (Record, fol. 52).

It is believed that this Court has decided the question, maintaining the Constitutionality of the Act, as an exercise of the War Power of the Government.

Miller vs. *United States*, 11 Wal., 268, 304.

In *Conrad* v. *Waples*, (6 Otto, 279, 285,) *Mr. Justice Field*, speaking of the Act of 1862 and the power of Congress, remarked,—"It, "(the Statute,)" might undoubtedly have provided for the confiscation of the entire property from its being in the enemy's Country; but the Legislature did not so enact, &c."

In the Case at Bar, the Property confiscated was situated in the enemy's Country, and its owner was domiciled there. Both were subject to the exercise of the War power of the Government.

In *Union Insurance Co.* v. *United States.* (16 Wal, 759.) This Court sustained the Act of 1861, as extending to all descriptions of Property. It reversed the Decree below, because of irregularity in the Proceedings, they being in Admiralty, and not according to the course of the Common Law, but the Case essentially upholds the Constitutionality of the Act, both in its forfeiture of Property and its method of enforcing it.

It cannot be said, that this doctrine of the Court upholds the Act, so far only as it reaches the life estate of the Owner.

It being settled, that it is not a Municipal Act, but the Act of a belligerent in the exercise of the War power, the Constitutional provision against attainders and forfeitures for Treason, does not apply.

The qualifying Resolution attached to the Act of 1862 does not. It does not profess to do so. It was not intended to restrict the War power of the Government, and cannot so operate. The Act of 1861 condemns the whole title. The Court below therefore erred in holding that the Decree of Condemnation and Sale only conveyed an Estate for Life. (Record, fol. 54).

In *Bigelow* v. *Forest*, (9 Wal., 339,) the Confiscation Proceedings were under the Act of 1862. The Owner of the property was an Officer of the Navy of the Confederate States. The Case cannot affect the question presented here.

The same may be said of the *Confiscation Cases*, (20 Wal., 92.) relating to *Mr. Slidell's* land.

II.—Aside from the proposition that the whole title of *Charles Willey* was divested by the Confiscation Decree and Sale, the Plaintiffs below failed to show title, or right of possession. Conveyances to *Willey* appear in the Record, but in themselves they furnish no right of recovery in Ejectment against an actual possession. So far as shown, *Willey* never had possession. His Heirs cannot recover against the occupants solely upon the foot of Deeds to their Ancestors. It cannot be answered, that the Confiscation Proceeding sassume title in *Willey*. The Plaintiffs in Error are not shown in privity with them or with the Marshal's Deed. They stand upon naked possession. That is enough against all except the true owner. The Plaintiff in Ejectment must stand "upon the strength of his own title, not upon the weakness of his adversary's."

The Decree should be reversed.

W. A. BEACH,

Counsel for Plaintiffs in Error.

U. S. SUPREME COURT.

PETER JONES et al.,

VS.

JOHN BUCKLES et al.

BRIEF OF APPELLEES ATTORNEY.

C. W. JONES,

Appellees Attorney.

ASHMEAD BROS., PRINTERS.

In the Supreme Court of the United States.

PETER JONES, GEORGE A. DECOTTES AND W. S. WHITLOCK

vs.

JOHN BUCKLES AND MARY BUCKLES AND FRANCES E. YALE.

This is an action of ejectment, taken up by writ of error by the defendants in the court below—Peter Jones, George A. DeCottes and W. S. Whitlock (who are, therefore, the appellants in the Supreme Court)—from a judgment rendered in the Circuit Court of the United States for the Northern District of Florida, Fifth Judicial Circuit, in favor of John Buckles and Mary Buckles, his wife, and Frances E. Yale, ~~defendants~~ plaintiffs in the Circuit Court and appellees in the Supreme Court of the United States

The suit was originally brought in the State Circuit Court for Duval county, Fourth Judicial Circuit of Florida, and transferred to the United States Circuit Court for the Northern District of Florida, under and by virtue of the act of Congress in such cases made and provided.

The facts in the case are:

The property in controversy, situated in the city of Jacksonville, Duval county, Florida, was owned by Charles Willey, in his lifetime, and confiscated by decree of the United States District Court for the Northern District of Florida, in the year 1862 or 1863, under the act of Congress entitled, "An act to confiscate property used for insurrectionary purposes," approved August 6th, 1861.

Charles Willey died February 15th, 1875, leaving Frances E. Yale and Mary Buckles, his only surviving children, who are the real plaintiffs in said suit, John Buckles being but a nominal plaintiff, as the husband of Mary Buckles, formerly Mary Willey.

The only question of law involved is as to the effect of said decree of confiscation, and the tenure or estate conveyed to the purchaser by the sale had under said decree of confiscation.

The plaintiffs in the court below (who are the appellants in the Supreme Court) contend that the confiscation sale only vested the property in the purchaser for and during the lifetime of Charles Willey, and that on his death his surviving children became the owners in fee, on the constitutional principle that "no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."

Constitution of the United States, article III, section 3, paragraph 2.

There is no direct decision of the United States Supreme Court on the construction, application and effect of the confiscation act of 1861 that counsel can discover. Hence, the decisions construing the act of July 17th, 1862, have to be invoked, and the analogy pursued, as appellees contend the same constitutional principle is involved in both acts; and that the same line of argument employed and the reasoning pursued by the court in arriving at their conclusions in the cases decided involving the act of 1862, are equally applicable to a proper construction and decision of the act of 1861. They both rest on the same constitutional basis.

It has been repeatedly and clearly decided, so that there can now be no room for doubt on the subject, that confiscation sales under the act of July 17th, 1862, and the joint resolution of Congress of same date, explanatory of it, can only hold the property during the life of the person for whose offense it has been seized.

Bigelow vs. Forrest, 9 Wallace, page 339.

Day vs. Micou, 18 Wallace, 156.

Wallach *et al.* vs. Riswick, 2 Otto, 202.

The issue is reduced to the single one, whether the acts of 1861 and 1862 are similar in effect, and subject to the same construction and operation or not.

In order to determine if any difference in the legal effect of the two acts exists, let us compare their titles and see if their objects are not substantially the same as expressed in their titles; and let us also compare section 1 of the act of 1861 with section 6 of the act of 1862, so as to arrive at the identity, or otherwise, of the intention and purpose of their enactment. If the two acts are susceptible of such construction as to harmonize them, it is to be preferred to a construction that will antagonize them; and they must be regarded as being "in *pari materia*."

Dwarris on Statutes, pages 568 and 569.

1 Kent's Coms page 463.

The same constitutional principle must, of necessity, apply to both. If, therefore, President Lincoln's objection to signing the act of 1862 was valid until the joint resolution was passed explanatory of said act, then the same objection would apply to the act of 1861, if the confiscation under it is to extend beyond the life of the original owner and *offender*.

See Bigelow vs. Forrest, 11 Wallace, pages 340 and 341.

Both acts are pronounced to be passed under the war-making power of the government, provided for in article I, section 8, paragraphs 10 and 17 of the Constitution of the United States.

Miller vs. United States, 11 Wallace, page 268.

Both acts provide for proceedings "*in rem*," but at the same time those proceedings are consequent on the *treasonable act* OR CONSENT *of the owner* of the property confiscated, and are in the nature of a *personal penalty for his treason*.

Supreme Court of th

October Term, ---

PETER JONES, GEORGE L. DE COTTES, AND WILLIAM S. WHITLOCK, PLAINTIFFS IN ERROR,

vs.

JOHN BUCKELL AND MARY E. BUCKELL.

No. 186.

In Error to the Circuit Court of the United States for the Northern District of Florida.

ADDITIONAL BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

This case was originally brought by the defendants in error in the State Circuit Court for Duval county, fourth judicial circuit of the State of Florida, on the 5th day of September, 1876, to recover certain lots in the city of Jacksonville, set forth and described in the pleadings. The case was transferred, upon the petition of William S. Whitlock, (who claims to be the owner of the property, and states in his petition that he is a citizen of the State of New York,) to the Circuit Court of the United States for the Northern District of Florida, on the 2d day of June, 1877.

OFFICE SUPREME COURT U.S.
FILED
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Supreme Court of the United States.

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When the case came on to be heard in May, 1878, in the United States Circuit Court, certain deeds were introduced in evidence, (Record, pp. 6, 7, 8, 9, 10, and 11,) showing that title to the land in controversy had vested in Charles Willey, and that under certain proceedings had in the District Court of the United States for the Northern District of Florida, under the confiscation act of 1861, said property was condemned and sold, and John S. Sammis became the purchaser, and a deed was made to him by the United States marshal conveying the fee-simple title to him.

It was admitted on the trial by the plaintiffs below that the proceedings in the confiscation suit and the sale thereunder were regular, and that John S. Sammis was the purchaser at said sale. It was admitted by the defendants below that Francis E. Yale and Mary E. Buckell are the children and only heirs at law of Charles Willey, and that the lands in controversy are the same lands which the defendants below were in possession of at the date of the service of the summons herein :

The court charged the jury as follows:

"1st. That the act of Congress passed August 6, 1861, is constitutional and in full force.

2d. That a confiscation of property under said act of Congress and in pursuance of its provisions is good and valid, and can only be reviewed by writ of error or appeal, provided the court does not exceed its jurisdiction, and for instance sell a fee-simple when it can only sell a life estate.

3d. That a sale of realty under and in pursuance of the said act of Congress passed August 6, 1861, carried with it all the title of the owner, without any reservation of interest whatever to him or to any one else, subject of course to all existing liens at the time of seizure of the property.

4th. That the act of Congress of August 6, 1861, was an exercise of belligerent rights and entirely within the scope and authority of Congress.

5th. That the acts of 1861 and 1862 are different; the

act of 1861 enforcing confiscation of property for the reason that the property itself had been used or employed for confederate purposes; the act of 1862 enforcing confiscation for the reason that the individual was the offender and his property seized for two reasons: first, that the enemy should not have the benefit of it; second, as a punishment of the offender. But both acts made knowledge and consent of the owner a necessary ingredient to confiscation. This much is said in response to the prayer for special instructions in behalf of the defendants.

The learned counsel, by an agreement filed in the case, have relieved us of much trouble. This case is presented: Charles Willey, the owner of the lot in question, consented to its being used in aid of the rebellion. It was confiscated and sold, and a deed made to purchaser which purported to pass the fee-simple. Charles Willey died in 1875, and his heirs now come forward and claim the property described in the declaration.

Purchasers at judicial sales can only take such interest and title as it was in the power and jurisdiction of the court directing the sale to give.

The acts of 1861 and 1862, though differing in some respects, are in pari materia; while the one treats of property, the other of the person, both are on account of the acts of the person offending. The Armstrong foundry case shows that you cannot proceed against the offending thing without coupling with it the guilty knowledge and consent of the person, and that the pardon of the offender absolved the property as well as the person.

Upon the review of the whole case the court charges you that the condemnation sale of the lot in question, purporting to convey a fee-simple, only conveyed an estate for the life of Charles Willey, and that the heirs of the said Chas. Willey are entitled to recover the same."

The jury found for the plaintiffs, and judgment for possession and for $932.50 for mesne profits and for costs was rendered for the plaintiffs against the defendants.

A motion for a new trial was made by the defendants for the reasons—

First. That the charge to the jury was erroneous and

against the law in this: "that the fee-simple purported to be conveyed by deed of the United States marshal to John S. Sammis only conveyed a life estate, and that the court exceeded its jurisdiction."

Second. General errors.

The court overruled the motion, and defendants took a bill of exceptions and brought the case here by writ of error, and now assign as error the following:

"First. That upon the trial at the circuit the learned judge erred in his instructions to the jury that 'the acts of 1861 and 1862, though differing in some respects, are in pari materia; while the one treats of property, the other of the person, both are on account of the acts of the person offending. The Armstrong foundry case shows that you cannot proceed against the offending thing without coupling with it the guilty knowledge and consent of the person, and that the pardon of the offender absolved the property as well as the persons. Upon the review of the whole case the court charges you that the condemnation and sale of the lot in question purporting to convey a fee-simple only conveyed an estate for the life of Charles Willey, and that the heirs of the said Charles Willey are entitled to recover the same;' whereas he should have charged that the condemnation and sale of the lot in question purporting to convey a fee-simple did, in law, convey a fee-simple, and that the heirs of Charles Willey were not entitled to recover the same.

"Second. That the said learned judge erred in refusing the motion made at the trial term for a new trial; whereas he should have granted such motion for the reasons stated therein upon the record.

"Third. That the third instruction of the said learned judge to the jury given in answer to the prayer of the defendants is inconsistent with that portion of his charge which instructed the jury 'that the condemnation and sale of the lot in question purporting to convey a fee-simple only conveyed an estate for the life of Charles Willey.'

"Fourth. That the said learned judge erred in his charge to the jury on said trial wherein he instructed them 'that the heirs of the said Charles Willey were entitled to recover the lot in question;' whereas he should have stated that they were not entitled to recover the same."

POINTS.

The learned counsel for the plaintiffs in error in his brief takes exception to the proceedings in the court below, as shown by the record, in that Francis E. Yale and Mary E. Buckell are shown by the stipulation between the parties to be the only heirs at law of Charles Willey, while the judgment was rendered in favor of John Buckell and Mary E. Buckell. He does not, however, lay stress upon this point, and it was not referred to in the court below upon the motion for a new trial. The stipulation entered into by the counsel for the respective parties below shows very clearly that it was their purpose and intent to litigate the single question of law as to the effect of the decree of confiscation under the act of Congress of August 6, 1861, and the court, in its charge, was guided by this stipulation.

The clauses of the Constitution which bear upon this case are the following:

"Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." (Art. 1, sec. 8, par. 11.)

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." (Art. 1, sec. 8, par. 15.)

"The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States." (Art. 2, sec. 2, par. 1.)

"Treason against the United States shall consist in levying war against them, or in adhering to their enemies, giving them aid and comfort." (Art. 3, sec. 3, par. 1.)

"The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." (Art. 3, sec. 3, par. 2.)

"No bill of attainder or ex post facto law shall be passed." (Art. 1, sec. 9, par. 3.)

This court have been called upon to adjudicate a great variety of questions growing out of the late war between the States, but the exact one presented by this record has never been passed upon by them, so far as I can discover.

It was held in the Prize Cases that "insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on." (2 Black, 666.)

Also that, "by the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. * * * If a war be made by invasion of a foreign nation the President is not only authorized but bound to resist force by force. He does not initiate the war, but he is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less war, although the declaration of it be 'unilateral.'" (Ib., 668.)

Again, in the case of The State of Texas *v.* White, speaking with respect to the effect of the ordinances of secession adopted by the several States in insurrection, this court say:

"The obligations of the State as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired.

"It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of the rebellion, and must

become a war for conquest and subjugation." (7 Wall., 726.)

"During the war, the rights of the State as a member, and her people as citizens, of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character and incurred the consequences of rebellion. These new relations imposed new duties upon the United States. *The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union.*" (Ib., 727.)

These adjudications settle the character of the war, and its effect upon the States and the citizens of the States which were engaged in the insurrectionary organization. All persons residing within that territory were traitors, but not the less enemies because they were traitors; and they were liable to be treated as enemies, though not foreigners, but citizens.

This court have held the confiscation acts of August 6, 1861, and July 17, 1862, to be constitutional, as having been passed by Congress in the exercise of rights as a belligerent under the law of nations. But inasmuch as the act of July 17, 1862, was construed and qualified by subsequent joint resolution, the court have uniformly construed the two together, and have held that there could not be under them a forfeiture of the real estate of an offender beyond his natural life, either directly or indirectly; and that the punishment inflicted upon the offender is not to descend to his children; that his inheritable blood is not corrupted. (Bigelow *v.* Forrest, 9 Wall., 352.)

The joint resolution was passed by Congress in deference to the known views of the President with respect to the doubtful constitutionality of the bill. When we take into consideration the adjudications of this court made since the bill was before the President for his approval, with respect to the character of the war, there can scarcely remain a doubt that the scruples of the President were well founded.

The makers of the Constitution left nothing indefinite so far as what should constitute treason against the United States is concerned. They said: "Treason against the United States shall consist in levying war against them, or in adhering to their enemies, giving them aid and comfort." Were the citizens of the States lately in insurrection engaged "in levying war against the United States?" If so, they were guilty of treason. For this crime the Constitution says the Congress shall have power to declare the punishment, "but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."

There is nothing in the law of nations with respect to the rights of belligerents which prevents a belligerent from depriving an enemy of his entire estate in property within the reach of his power. It was so at the time of the adoption of the Constitution. The makers therefore provided that in civil wars in this country the estate in property of those who engaged in levying war against the United States should not be forfeited beyond the life of the person attainted. A man may be convicted and yet not attainted. After conviction only, a man is liable to none of the disabilities of attainder imposed by statutes in States or countries where there is attainder, for the reason that there is still, in contemplation of law, a possibility of his innocence. Attainder is only after judgment. Can it be said then that Congress have the right under the war-making power, in the exercise of rights as a belligerent under the law of nations, to do before conviction that which they are prohibited from doing by the Constitution after conviction—that, too, when the clause of the Constitution in which this prohibition is contained treats of the very question of rebellion or civil war? If a man engaged in the late rebellion had been tried, convicted, and judgment had against him for treason, for levying war against the United

States, there could have been no forfeiture of his land beyond his life, although he might have suffered death.

The rights of belligerents are governed by the law of nations, which is the law of all tribunals in the society of nations, and is supposed to be equally understood by all. So, with respect to the rights of foreign nations arising out of the late civil war, they were to be ascertained and governed by the law of nations. But with respect to matters which alone concerned citizens of the United States and their relations to the Government, the rule of action must be the Constitution of the United States, if it has spoken upon the subject, although what it says may be a restriction upon the powers of the Government as a belligerent, under the law of nations.

The law of August 6, 1861, as contained in section 5308 of the Revised Statutes, is as follows:

"Whenever during any insurrection against the Government of the United States, after the President shall have declared by proclamation that the laws of the United States are opposed and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person or his agent, attorney, or employé purchases or acquires, sells or gives, any property of whatsoever kind or description, with intent to use or employ the same, or suffers the same to be used or employed in aiding, abetting, or promoting insurrection or resistance to the laws, or any person engaged therein, or being the owner of any such property, knowingly uses or employs, or consents to such use or employment of the same, all such property shall be lawfully subject of prize and capture wherever found; and it shall be the duty of the President to cause the same to be seized, confiscated, and condemned."

The remaining sections relate to the procedure in the courts for the seizure, confiscation, and condemnation of the property.

This act came before this court for interpretation in the

Armstrong foundry case, and the chief justice, speaking for the court in that case, said:

"It was insisted, in argument, that the pardon pleaded by the appellant cannot avail to relieve him from the forfeiture of the property seized, because the liability to seizure arose under the statute from the mode in which the property was employed, and was not to be regarded as a penal consequence of the act of the owner.

"We are unable to concur in this view. We think it clear that the statute regarded the consent of the owner to the employment of his property in aid of the rebellion as an offense, and inflicted forfeiture as a penalty." (6 Wall., 769.)

If this view of the statute is correct, which it undoubtedly is, there is an end to the controversy in this case. If the forfeiture is inflicted as a penalty for the offense of the owner, then the forfeiture cannot extend beyond the life of the offender. In this view the statute is constitutional; otherwise not; and when a statute will bear two constructions, one of which would be within the constitutional power of Congress to enforce, and the other a transgression of the power, that must be adopted which is consistent with the Constitution. (Miller *v.* United States, 11 Wall., 309.)

Under this view, there is no error in the first charge of the court below.

With respect to the correctness of the proposition of law contained in the second charge, it has been definitely settled by this court in Bigelow *v.* Forest, 9 Wall., 339; Day *v.* Micou, 18 Wall., 156; *ex parte* Lange, Ib., 177.

If the third charge of the court is to be construed so as to exclude any reservation of interest in the heirs of the owner, then it would be error; but the court modified the instructions asked by the defendants below by leaving out the words "to heirs." But if it were error, it would be such as the plaintiffs in error could not complain of.

The fourth and fifth charges state the law as it has been

settled by this court by the cases before cited. That portion of the charge which states that "the acts of 1861 and 1862, though differing in some respects, are *in pari materia*," is clearly correct. The proceedings for confiscation in a large number of the cases which have come before this court are shown by the records in the several cases to have been begun and conducted under the provisions of the two acts together as one system or mode of procedure, notably the leading case of Miller *v.* United States, 11 Wall., 259; and in the consideration of the cases this court have discussed the two laws as together embodying the policy of Congress upon the subject of confiscation. In no instance have this court held that more than the estate for the life of the owner was confiscable under proceedings authorized by the two acts, and the fact that the decree of the court may have condemned the fee does not alter the case.

The learned counsel on the other side has cited a sentence from the opinion of Mr. Justice Field, in which he dissented from the judgment of the court, in Conrad *v.* Waples, 6 Otto, 285, which is as follows: "It," the statute, "might undoubtedly have provided for confiscation of the entire property from its being in the enemy's country; but the Legislature did not so enact," &c. I think the counsel has mistaken the meaning of the learned justice, whose opinions are always entitled to so much consideration that it would be a source of regret to believe he was correctly understood by the counsel in this instance. I quote the sentence and its context, as follows:

"The statute not only did not recognize past acts as grounds for confiscation, but it reached only the estate of the actual owner of the property seized. It might undoubtedly have provided for confiscation of the entire property, from its being within the enemy's country, but the Legislature did not so enact. Congress limited the exercise of its power of confiscation to those cases where the owners were officers or agents of the insurrectionary organi-

zations, or one of the States composing it, or commanding its army or navy. * * * It was the seizure and confiscation of 'the estate, property, money, stocks, credits, and effects' of the persons thus specifically designated that the act authorized, not the seizure and confiscation of property in enemy's territory, or of enemies generally."

I think it will be seen by reading these sentences together that the learned justice referred, when he used the words "entire property," not to the "entire *estate*," which any particular offender had in any particular piece of property, but to the "entire property" situated within the insurrectionary States.

The punishment of treason declared by the act of April 30, 1790, is death, but section 24 of that act, which was entitled "An act for the punishment of certain crimes against the United States," provided "that no conviction or judgment for any of the offenses aforesaid shall work corruption of blood, or forfeiture of estate." The law remained thus until the passage of the acts of 1861 and 1862. With respect to the punishment declared by Great Britain for certain crimes against the Government, including treason, Blackstone in his Commentaries says:

"Disgusting as this catalogue may seem, it will afford pleasure to an English reader, and do honor to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation of Europe." (4 Bl., 377.)

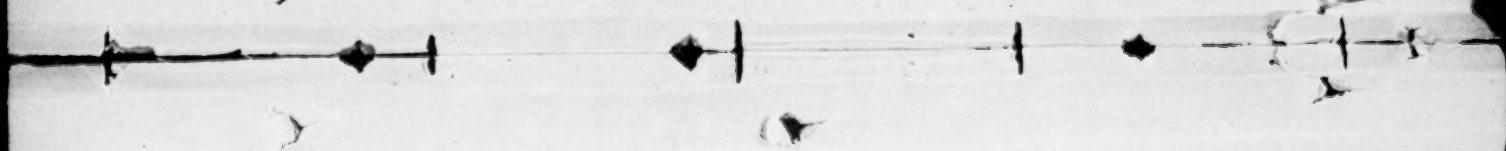
And Mr. Rawle in his work on the Constitution, speaking of attainder, says:

"The doctrine is resolved into an odious fiction, founded on a compound of cruelty and avarice, springing from a perversion of the system of tenures, and at variance with the liberal principles of modern times and the very elements of justice." (Rawle on Constitution, 146.)

It would startle the country from that repose in which it is now resting, and restoring its exhausted strength, after the intervening years since the close of the war, for this august tribunal, representing the majesty of law in a government which boasts of its advanced position with respect to the liberty of its citizens, to announce the doctrine, in the face of a popular interpretation of the Constitution among our people to the contrary, that the Congress, in the exercise of the war-making power, may provide for the confiscation of property so as to work a forfeiture of real property beyond the life of the owner, in the case of a citizen who has been engaged in levying war against the United States.

The judgment should be affirmed.

C. W. JONES,
For the Defendants in Error.



TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1060.

VINCENT MICAS, PLAINTIFF IN ERROR,

vs.

OTHO H. WILLIAMS, EXECUTOR OF JOHN B. HOWELL, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 15, 1881.

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1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and eastern district of Louisiana.

OTHO H. WILLIAMS
vs.
VINCENT MICAS. } No. 9472.

Petition.—Filed June 1st, 1881.

To the hon. the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The petition of Otho H. Williams, a resident of Baltimore, in the State of Maryland, executor of the estate of the late John B. Howell, with respect represents that Vincent Micas, a citizen of the Republic of France, has been occupying certain premis' in this city, the property of said estate of John B. Howell, on Royal street, between Canal and Custom-house streets, and running back through to Exchange alley, known as Nos. 14 and 16 Royal street; that he has occupied said prem-
2 ises as the tenant of petitioner under a certain written lease, dated at New Orleans, a duly-certified copy of which is hereto annexed and made part hereof, marked A; that said lease expired on 31st May, 1881; that petitioner has never renewed said lease, but on the contrary has notified the said Vincent Micas, both verbally and in writing, to vacate said premises at the expiration thereof; and petitioner annexes hereto and makes part hereof a copy of said written notice to vacate, marked B, the original of which was served upon said Vincent Micas on May 14, 1881.

Petitioner alleges that said Vincent Micas refuses to vacate the said premises, and continues to occupy the same.

Petitioner reserves the right to sue for damages. Wherefore he prays that the said Vincent Micas be cited to appear and answer this petition, and that after due proceedings had he be condemned to vacate the said above-described premises and to deliver possession
3 thereof to petitioner; and petitioner prays for costs and general relief.

(Signed) J. O. NIXON, JR., *Att'y.*

EXHIBIT A.

Copy of lease.—Filed with and made part of petition.

Otho H. Williams, executor of the estate of John B. Howell, of the city of Baltimore, hereby agrees to lease to Vincent Micas, of the city of New Orleans, Louisiana, the Sazerac House, running through from Royal street to Exchange alley, from the first of November, 1879, to the first of June, 1881, at a rent of four thousand five hundred dollars per annum, payable as follows: Six quarterly rent-notes of one thousand-one hundred and twenty-five dollars each ($1,125), and one rent-note for three hundred and seventy-five dollars, dated and *measuring* as follows:

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Otho H. Williams, executor of the estate of John B. Howell, of the city of Baltimore, hereby agrees to lease to Vincent Micas, of the city of New Orleans, Louisiana, the Sazerac House, running through from Royal street to Exchange alley, from the first of November, 1879, to the first of June, 1881, at a rent of four thousand five hundred dollars per annum, payable as follows: Six quarterly rent-notes of one thousand-one hundred and twenty-five dollars each ($1,125), and one rent-note for three hundred and seventy-five dollars, dated and *measuring* as follows:

One note dated	Nov. 1, '79,	due	Feb'y 1, 1880			$1,125
"	"	"	"	"	May 1, 1880	1,125
"	"	"	"	"	Aug. 1, 1880	1,125
"	"	"	"	"	Nov. 1, 1880	1,125
"	"	"	"	"	Feb'y 1, 1881	1,125
"	"	"	"	"	May 1, 1881	1,125
"	"	"	"	"	June 1, 1881	375

Amounting to seven thousand one hundred & twenty-
4 five dollars $7,125 00

During the continuance of this lease, the said lessees agree to keep the Sazerac House and premises in good order; to make all repairs and alterations at their own expense; to put nothing therein which would forfeit the insurance, and to make no sublease of them without the consent of the lessor, who reserves to himself the right of annulling this lease in case said lessors should at any time fail to pay the rent as stipulated, or should otherwise violate this contract; and the said lessees obligate themselves to deliver up and return the same at the expiration of the present lease, with all the fastenings and appurtenances in equal good order, to the said Otho H. Williams.

The privies to be cleaned at the expense of the lessees.

(Signed) O. H. WILLIAMS.
VINCENT MICAS.

Signed in duplicate.
H. BUCHHOLZ.

Witness—
EDWIN HARRIS.

UNITED STATES OF AMERICA,
State of Maryland, to wit:

5 I, Wm. H. Masson, notary public, by letters patent under the great seal of the State of Maryland, commissioned and duly qualified, residing in the city of Baltimore, in the State aforesaid, do hereby certify, attest, and make known that the foregoing writing is and does contain a true copy of the original lease made by Otho H. Williams, executor of the estate of John B. Howell, of the city of Baltimore, to Vincent Micas, of the city of New Orleans, of which it purports to be a copy, as made from said original exhibited to me this day by said Otho H. Williams.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal this thirtieth day of April, eighteen hundred and eighty-one.

[SEAL.] (Signed) WM. H. MASSON,
Notary Public.

STATE OF MARYLAND,
Baltimore City:

6 I hereby certify that Wm. H. Masson, esquire, by whom the annexed certificate was made, and who has thereto subscribed his name, was, at the time of so doing, a notary public of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn, and that to all acts done by him in that capacity full faith and credit are due and ought to be given, and that his signature thereto is genuine.

In testimony whereof, I hereto set my hand and affix the seal of the superior court of Baltimore City, this 30th day of April, A. D. 1881.

[SEAL.] (Signed) FRANCIS A. PREVOST,
Clerk of the Superior Court of Baltimore City.

EXHIBIT B.

Notice to Micas.—Filed with petition.

NEW ORLEANS, *May* 14, '81.

Mr. VINCENT MICAS, *New Orleans:*

DEAR SIR: You are hereby notified to vacate the premises now
7 occupied by you on Royal street, in this city, Nos. 14 and 16, on or before the 31st of May, 1881, as the lease which you have upon said premises expires on that day.

Respectfully, yours,
(Signed) EDWIN HARRIS,
Agent of Otho H. Williams, Ex'r.

NEW ORLEANS, *May* 14, 1881.

Served a true copy of the within upon Vincent Micas in person, this day, at his place of business, No. 14 and 16 Royal street, at one o'clock p. m.

(Signed) EDWIN HARRIS.

Citation.—Issued June 1st, 1881.

UNITED STATES OF AMERICA,
Eastern District of Louisiana:

U. S. cir. c't, E. dist. of La.

OTHO H. WILLIAMS, EX'R,
vs.
VINCENT MICAS. } No. 9472.

To VINCENT MICAS:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or to de-
8 liver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 1st June, 1881, and of the Independence of the United States of America the 105th year.

[SEAL.] (Signed) T. V. COUPLAND, *D'y Clk.*

Marshal's return.

Rec'd June 1, 1881, by the U. S. marshal, and on June 3d, 1881, I served a true copy of the within citation and accompanying petition

on Vincent Micas, def't herein, by handing the same to him in person, in the city of New Orleans.

(Signed) E. S. CARRY,
D'y U. S. Marshal.

9 *Exception.—Filed June 14th, 1881.*

O. H. WILLIAMS
vs.
VINCENT MICAS. } No. 9472.

Now into court comes defendant, by way of exception, and says:

First. That he is entitled to have and claims oyer of the letters of executorship of plaintiff in the estate of John B. Howell, deceased.

Second. That the executor herein averring his citizenship of Maryland, has no right, in virtue of his authority granted in said State as executor, to have or maintain a suit at law in this State.

Third. That it is not averred in said petition that said defendant has occupied or is occupying said premises without authority from plaintiff.

Wherefore defendant prays this his exception may be maintained, and plaintiff's writ dismissed with costs.

(Signed) W. S. BENEDICT AND
E. W. HUNTINGTON,
Att'ys for Exceptor.

10 *Order: Submission of exception.—Extract from the minutes, April term,* 1881.

NEW ORLEANS, *Saturday, June 18th,* 1881.

Court met pursuant to adjournment.

Present, Hon. Don A. Pardee, circuit judge.

OTHO H. WILLIAMS
vs.
VINCENT MICAS. } No. 9472.

The exception herein came on this day for trial—J. O. Nixon, jr., for plaintiff; E. W. Huntington, W. S. Benedict, for exceptor—and after arguments of counsel for both parties, the court took time to consider.

Order: Exception overruled.—Extract from minutes of June 21st, 1881.

OTHO H. WILLIAMS
vs.
VINCENT MICAS. } No. 9472.

The counsel for pl'ff having produced and filed a duly-certified transcript of the record of the succession of J. B. Howell, No. 10053 on the docket of the 2d district court for the parish of Orleans, it was thereupon ordered by the court that the defendant's exception be overruled.

11 *Answer.—Filed June 22d*, 1881.

United States circuit court.

O. H. WILLIAMS
vs.
VINCENT MICAS. } No. 9472.

Now into court comes defendant, & reserving the benefit of the exceptions hereinbefore filed, for answer to the petition of plaintiff pleads a general denial, except as hereinafter admitted, and further answering, he admits that up to the first of June, 1881, he occupied the premises in dispute under a lease, marked A, annexed to plaintiff's petition, and he avers that, on the first of June, 1881, he commenced a new lease with said plaintiff under a renewal made and effected prior to said date with the said plaintiff, on the terms and conditions and for the time set forth in detail in the annexed lease, made part hereof and lettered C; that said agreement of renewal was verbal, and not in writing, and said plaintiff refuses to carry the same into effect. That your respondent has been advised, and has taken proper action
12 to enforce the compliance of said agreement of renewal, and the signing of said renewal lease.

Wherefore defendant prays there be judgment in his favor, with costs, and for all general relief.

(Signed) W. S. BENEDICT,
E. W. HUNTINGTON,
Att'y.

(Signed) V. MICAS.

Subscribed and sworn before me, June 29th, 1881.

(Signed) T. V. COUPLAND,
Comm'r U. S. Circuit Court, East. Dist. of La.

Lease lettered C and filed with answer.

JUNE 22D, 1881.

Know all men by these presents that I, Edwin Harris, of the city of New Orleans, agent and attorney in fact of Otho H. Williams, executor of the last will of John B. Howell, deceased, do hereby, in my capacity of agent aforesaid, let and lease unto Thos. H. Handy, agent, of the city of New Orleans, for the term of fifteen years, beginning
13 on the first day of June (1881), eighteen hundred and eighty-one, and ending on the (31st) thirty-first day of May (1896), eighteen hundred and ninety-six, the following-described property situated in the city of New Orleans, and belonging to the estate of John B. Howell, to wit:

The premises known as numbers fourteen and sixteen Royal street, running through to Exchange alley, measuring sixty feet front on Royal street, with a depth of about one hundred and twenty-three feet, and measuring fifty feet four inches front on Exchange alley, as per survey made by Arthur D'Armas, assistant city surveyor, on the twenty-sixth day of March, one thousand eight hundred and eighty-one, for the following rental and upon the followi g terms and conditions, to wit:

1. The said Thomas H. Handy, agent, shall pay a yearly rental of three thousand five hundred dollars ($3,500), payable quarterly, to wit: The sum of eight hundred and seventy-five dollars ($875) to be paid on the first day of November, 1881, and quarterly thereaf-
14 ter, as evidenced by rent notes made by the said Thomas H. Handy, agent, and payable to the estate of said John B. How-

ell, to wit, dated April 27, 1881, and maturing November, 1881, February, 1882, May, 1882, August, 1882, November, 1882, February, 1883, August, 1883, May, 1883, November, 1883, February, 1884, May, 1884, August, 1884, November, 1884, Feb'ry, 1885, May, 1885, August, 1885, November, 1885, Feb'ry, 1886, May, 1886, August, 1886, November, 1886, Febr'y, 1887, May, 1887, Aug't, 1887, November, 1887, Febr'y, 1888, May, 1888, Aug't, 1888, November, 1888, Febr'y, 1889, May, 1889, Aug't, 1889, Nov'r, 1889, May, 1890, Aug't, 1890, Febr'y, 1890, November, 1890, Febr'y, 1891, May, 1891, Aug't, 1891, November, 1891, Feb'y, 1892, May, 1892, Aug't, 1892, November, 1892, Feb'y, 1893, May, 1893, August, 1893, November, 1893, February, 1894, May, 1894, August, 1894, Nov'r, 1894, Febr'y, 1895, May, 1895, August, 1895, November, 1895, February, 1896, and May, 1896, each for the sum of ($875) eight hundred and seventy-five dollars, amounting to the sum of fifty-one thousand six hundred and twenty-five dollars ($51,625), and one note of same tenor and date maturing on June 1, 1896, for the sum of
15 two hundred and ninety-one & $\frac{66}{100}$ dollars (291.66).

2d. That said Thomas H. Handy, agent, shall pay all taxes and contributions levied and assessed upon said property, during the term for which this lease is made, including the taxes for the years 1881, and the payment of said taxes is hereby declared to be part of consideration of this lease.

3d. The said Thomas H. Handy, agent, shall keep the buildings and improvements erected or to be erected upon said leased property insured in a company or companies to be designated by the lessor against loss by fire in a sum not less than ($20,000) twenty thousand dollars, the policies to be made in favor of the lessor herein, Otho H. Williams, executor of the estate of the late John B. Howell, or his successor, in his said office, or the heirs of said John B. Howell, if they are placed in possession of the estate of said John B. Howell, as the case may be; the payment of said policies of insurance is hereby declared to be part of the consideration of this lease.

16 4th. The said Thomas H. Handy, agent, binds himself to erect upon the premises herein leased a substantial brick building, in accordance with the plans and specifications hereto annexed; said building to be under the supervision of and built to the satisfaction of such person or persons as the lessor may designate; said building to be the property of the lessor, and the erecting of said improvements is hereby declared to be part of the consideration which the said Thomas H. Handy, agent, pays for the hire of the premises herein leased.

5th. In case the said Thomas H. Handy, agent, shall fail to pay the taxes or other assessments or contributions upon the property herein leased when due, or shall fail to keep the property insured as herein agreed upon, and pay the premiums of insurance when due, or shall fail to comply with any of the other stipulations of the lease, then the lessor shall be authorized to cancel the lease, and to at once take possession of the leased premises, and the said Thomas H. Handy, agent, shall in such event have no claim whatever to compensation or
17 reimbursement for the value of any of the improvements of buildings he may have erected upon the leased premises, and the said lessor shall be authorized to take possession of the same without putting the said lessee in default, and the said lessee agrees to pay as attorney's fees ten per cent. upon any am't for which it may be necessary to bring suit.

6th. The said lessee binds himself to keep the property herein leased in good order and condition during the term of the lease; to make all

necessary and proper repairs thereon, and to leave the same at the expiration of this lease in good order and condition.

7th. In case the buildings and improvements upon the property herein leased shall be destroyed by fire in whole or in part during the term of this lease, the said lessee, Thomas H. Handy, agent, binds himself to repair and reconstruct the same, as the case may be, and the said lessor agrees to pay to said Handy such sum or sums as he may collect from the fire insurance companies upon the policy or policies herein provided for, towards the reconstruction of repairs of said im-
18 provements, it being the true meaning and intent of the agreement that the said reconstruction or repairs shall be made in such a manner as to restore the said buildings to the condition in which they were before said fire, whether the expense thereof be covered by the payments made by the insurance companies or not.

8th. And the said Thomas H. Handy, agent, hereby binds himself to commence the erection of the buildings and improvements herein stipulated to be built by him on the first day of June, 1881, and to complete the same within the term of five months from the said date, and to pay all the cost of said buildings and improvements within six months from June 1, 1881, and within that time to have the said buildings and improvements free from all builders' and mechanics' liens or claims of any kind whatsoever, and he, the said Thomas H. Handy, agent, hereby binds himself to pay to the said lessor, Edwin Harris, agent, the
19 sum of ($20,000) twenty thousand dollars in the event that he fails to comply with any of the stipulations contained in the said above last clause—eighth.

And now come and make themselves party to this agreement William Henry and John Shellang, both of this city of Orleans, who declare that they are cognizant of the terms thereof, and that they hereby bind themselves each for the sum of ($10,000) ten thousand dollars in solido with said Thomas H. Handy, agent, unto the said Edwin Harris, agent, and hereby promise and bind themselves to pay each the sum of ten thousand dollars in event the said Thomas H. Handy, agent, shall fail to complete the buildings herein agreed to be erected by him within the time agreed upon or shall fail to pay all the costs of said improvements and buildings within the time herein agreed upon, or shall fail to have the said buildings and improvements free of all builders' and mechanics' liens or claims of any kind within the time herein stipulated, or
20 shall fail to erect said buildings and improvements in the manner herein agreed upon; it being the true intent and meaning of the said William Henry and John Schellang to bind themselves to pay each the sum of ten thousand dollars to the said Edward Harris, agent, in case the said Thomas H. Handy, agent, shall fail to comply within the time herein fixed with any of the stipulations herein made in regard to the erection of buildings and improvements upon the property herein leased, and the payment for the said buildings and improvements.

Signed in duplicate in New Orleans this second day of May, one thousand eight hundred and eighty-one.

OTHO H. WILLIAMS, *Executor*,
Pp. EDWIN HARRIS.
THOS. H. HANDY,
Ag't for Wm. McQuoid.
WILLIAM HENRY.
JOHN SCHELLANG.

Witness':
J. O. NIXON.
FRANCIS W. BAKER.

21 *Hearing and verdict.—Extract from minutes, April term*, 1881.

NEW ORLEANS, *Friday, July* 1, 1881.

Court met pursuant to adjournment. Present, Hon. Don A. Pardee, circuit judge.

OTHO H. WILLIAMS
vs.
VINCENT MICAS. } No. 9472.

This cause came on for trial—J. O. Nixon, jr., Joseph P. Hornor, F. W. Baker, for plaintiffs; W. S. Benedict and E. W. Huntington for defendant—when the following-named jurors were called and sworn to well and truly try the issue joined herein:

1. B. F. CHAMBERS.
2. W. J. MCGEEHAN.
3. D. R. GRAHAM.
4. A. KILSHAW.
5. A. DENIS.
6. F. N. GUERINGER.
7. M. GRAS.
8. A. C. LANDRY.
9. GEORGE LEWIS.
10. G. BLACHE.
11. JOSEPH MARINE.
12. J. F. COURET.

And the jury being complete the trial was proceeded with, and after hearing the pleadings, evidence, and arguments of counsel,
22 and receiving a charge from the court, the cause was submitted to the jury, D. R. Graham being appointed foreman thereof, and they retired to consider on their verdict. After due deliberation, the said jurors returned into court and then and there, through their said foreman, rendered and delivered the following verdict, viz:

NEW ORLEANS, *July 1st*, 1881.

We, the jury, find a verdict for the plaintiff.

D. R. GRAHAM, *Foreman.*

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

Judgment.—Extract from judgment book, April term, 1881.

NEW ORLEANS, *Friday, July 1st*, 1881.

Court met pursuant to adjournment. Present, Hon. Don A. Pardee, circuit judge.

OTHO H. WILLIAMS, EX'RS,
vs.
VINCENT MICAS. } 9472.

23 By reason of the verdict of the jury herein, and in accordance therewith, it is ordered, adjudged, and decreed that Vincent Micas, defendant, do forthwith vacate the premises situated on Royal street, between Canal and Custom-house street', and running back and through to Exchange alley, and known as Nos. 14 and 16 Royal street, now occupied by him under a certain lease which expired on 31 May, 1881, a duly certified copy whereof is annexed to the petition herein and marked A, and to deliver possession thereof to the plaintiff, Otho H. Williams, executor of the estate of John B. Howell, deceased.

Judgment rendered July 1st, 1881.

Judgment signed July 13th, 1881.

(Signed) DON A. PARDEE, *Judge.*

Bill of exceptions for defendant.—Filed July 13th, 1881, nunc pro tunc, July 1, 1881.

U. S. circuit court, east. dist. of Louisiana.

OTHO H. WILLIAMS, EXECUTOR,
vs.
VINCENT MICAS.

24 Be it remembered that on the trial of this case in open court on Friday, the first day of July, 1881, the counsel for plaintiff having so requested, the court charged the jury as follows:

First. That if the jury find from the facts that it was the intention of the plaintiff to reduce to writing any contract of lease that he should make of the premises in question and that no lease was made in writing with defendant, then there was no lease with defendant, and the verdict must be for the plaintiff.

Second. That the promise to give a preference of the refusal of a proposition to lease to be made in futurity by some unknown person, and of uncertain terms, is not a lease and cannot be enforced as such.

Fourth. That if the jury find that the plaintiff promised, without consideration, to give the defendant the right to refuse or to accept a proposition to be made in the future by another person, this is not a contract.

Whereupon the counsel for the defendant asked the court
25 to give to jury the following charges:

First. That it was incumbent upon the plaintiff to prove his authority to appear in court as executor; which authority is specially at issue, and, as he has not done so, you will find for the defendant.

To this instruction the court stated to the jury that such issue had been disposed of on an exception in limine on the evidence submitted thereunder, and was not before the jury. (Here insert evidence.)

TRANSCRIPT OF RECORD OF THE SUCCESSION OF J. B. HOWELL.—FILED JUNE 21, 1881.

STATE OF LOUISIANA,
City of New Orleans:

Civil district court for the parish of Orleans.

Petition.—Filed March 31, 1856.

2d district court, parish of Orleans.

SUCCESSION OF J. B. HOWELL. No. 10053.

To the honorable the judge of the second district court of New Orleans:

26 The petition of Mrs. Susan E. Howell, residing in Baltimore, State of Maryland, widow in community of and to the late John Brown Howell, late of Baltimore, State of Maryland, now deceased, and the petition of Ann Eliza Howell, wife of Otho Williams, by him assisted, and daughter of John B. Howell, and the petition of Susan

Howell, of full age, daughter of said J. B. Howell, and all residing in Maryland, aforesaid, respectfully shows:

That John B. Howell died in Baltimore; that his will was there duly proved and ordered to be executed; that copy of said will and of the probate is hereto annexed, and it is prayed that the said will & testament executed on the 3d day of November, 1855, may be here admitted of record and ordered to take effect in this State according to law. And your petitioners show that by the said will and testament your petitioners are the universal legatees of all his property, and they show
27 that said estate has property in Louisiana, to wit, in the city of New Orleans, consisting of two properties, as which appears by the annexed titles, one purchased by said ancestor on 2d May, 1854, from successions of Alfred and F. B. Conrad, having 60 feet front on Royal street between Custom-house and Canal streets, by 125 feet, more or less, to Exchange place, and 2d one purchased George May on 25th November, 1854, forming the corner of Gravier and Carondelet, and measures 25 ft. 7 in. in width in the rear, 96 ft. 1 in. depth and front on Carondelet st., & 91 ft. 6 in. in depth on the opposite side line.

Now your petitioners show that this all the estate of said Howell in Louisiana; that there are no debts of said estate, and that they desire that the said will shall take effect, and that they, these petitioners, as widow in community and as universal heirs, be declared owners of said properties and be put in due and legal possession of the same, and for all other relief.

(Signed) LEVI CAIN.

Affidavit.

28 Otto Williams, being duly sworn, deposes that the allegations in the above petition are true and correct.

(Signed) O. H. WILLIAMS.

Sworn to & subscribed before me this 27th March, A. D. 1856.

(Signed) C. M. BRADFORD, *J. P.*

Last will and testament of J. B. Howell.—Filed 31st M'ch, 1856.

SUCCESSION OF J. B. HOWELL. } No. 10053.

2d dist. court, parish of Orleans.

I, John Brown Howell, of the city of Baltimore, declare this to be my last will and testament, hereby revoking every other will by me heretofore made.

I give and devise to my dear wife, Susan E. Howell, my present dwelling in Franklin street, with the furniture, plate, banks, paintings, and other personal property contained in it, and also my horses and carriages.

29 I give and bequeath to each of my five sisters, Mary Bruff, Catherine Janvier, Ann E. Sangston, Sarah Howell, and Honora Saper, the sum of two hundred dollars a year to be paid to them during life, half-yearly from my death, to and for their sole and separate use and benefit.

I bequeathe my niece, Ann Eliza Sangston, and my nephews, George Edwin Sangston and Edmund D. Janvier, the sum of one thousand dollars each.

I give to our faithful friend, Ann Hatton, one thousand dollars. I bequeathe to each of the servants who may be living with us at my death and whom my wife may deem worthy the sum of one hundred dollars. All the rest and residue of my estate, real and personal, including my interest and estate in any joint or partnership property in the State of Maryland or elsewhere, I give and devise absolutely and in fee to my said dear wife and to our two beloved daughters, Ann Eliza Williams and Susan Howell, as tenants in common, equally to be divided between the three.

I appoint my said dear wife and my son-in-law, Otho H. Williams, executors hereof, with power to sell or lease and convey such parts of my real estate as they and my said daughters may deem proper and judicious.

In witness whereof I have hereunto set my hand and seal this third day of November, in the year of our Lord 1855.

(Signed) JOHN BROWN HOWELL.

Signed, sealed, published, and declared by the testator, John B. Howell, as and for his last will and testament, in our presence, who at his request, in his presence and in the presence of each other, subscribed our names as witnesses thereto.

(Signed) JOHN S. WRIGHT.
FRANCIS COAK.
WILLIAM S. WILLIAMS.

BALTIMORE CITY, *ss:*

On the 12th day of November, 1855, came John S. Wright, Francis Coake, and William S. Williams the three subscribing witnesses to the aforegoing last will and testament of John B. Howell, late of said city, deceased, and made oath on the Holy Evangelist of Almighty God that they did see the testator sign and seal this will; that they heard him publish, pronounce, and declare the same to be his last will & testament; that, at the time of his so doing, he was, to the best of their apprehension, of sound and deposing mind, memory, and understanding, and that they subscribed their names as witnesses to this will in his presence, at his request, and in the presence of each other.

Sworn to in open court.

Test:

N. HICKMAN,
Register of Wills for Baltimore City.

In testimony that the foregoing is a true copy of the original will of said John B. Howell, and of the probate thereof, and order of the court admitting said will to record, taken from wills, liber N. H., No. 26, folio 532, being one of the records remaining in the office of the register of wills for Baltimore City, and that there is no other entry or record in said court relating thereto, I hereunto subscribe my name and affix the seal of said court this 25 day of January, in the year of our Lord 1856.

Test:

[SEAL.] (Signed) N. HICKMAN,
Register of Wills, Baltimore City.

MARYLAND, *sct:*

I, Edward D. Kemp, presiding judge of the orphans' court for Balti-

more City, in the State aforesaid, do certify that the foregoing attestation of Nathaniel Hickman, register of wills for said city, is in due form and by the proper officer.

Given from under my hand, at the city of Baltimore, this 25 day of June, A. D. 1856.

(Signed) E. D. KEMP.

STATE OF MARYLAND,
Baltimore City, ss:

I hereby certify that the honorable Edward D. Kemp, by whom the above certificate was given, and who has thereto subscribed his name, was at the time of so doing chief judge of the orphans' court for
33 Baltimore City, in the State of Maryland, duly elected, commissioned, and sworn.

In testimony whereof I hereunto subscribe my name and affix the seal of my office and of the said court this 25 day of January, A. D. 1856.

[SEAL.] (Signed) N. HICKMAN,
Register.

Power of attorney to Otho H. Williams from Susan E. Howell.—Filed M'ch 31, 1856.

2d dist. court, parish of Orleans.

SUCCESSION OF JOHN B. HOWELL. } No. 10053.

Know all men by these presents that I, Susan E. Howell, widow of John B. Howell, of the city of Baltimore, in the State of Maryland, to enable and authorize my son-in-law, Otho H. Williams, of said city, to represent and act for me in all things relating to the estase and to the succession and administration thereof of my said late husband in
34 the city of New Orleans and in the State of Louisiana and elsewhere, and of the State of Maryland, and for divers other causes and considerations, do hereby constitute and appoint my said son-in-law Otho H. Williams my true and lawful attorney and agent for me and in my name, as widow in community and as legatee and devisee under the will of my said late husband, John B. Howell, heretofore residing in the said city of New Orleans, to take and retain possession and control of all lands, lots, and other real estate, and of all the houses and improvements thereon, in the last-mentioned city and State, belonging to my said late husband, so far as relates to my interest therein as his widow and legatee as aforesaid or otherwise. And also to receive and receipt for all moneys, shares, rents, or dividends coming or belonging to me from him or from his estate in my capacities aforesaid. And as my attorney and agent as aforesaid, and in my name as widow or legatee as aforesaid or otherwise, to sign, seal, and deliver any and
35 every deed, bond, note, receipt, acquittance, or release which may be necessary and proper to obtain for me the possession, ownership, or enjoyment of any portion of the estate of my said late husband, or to sell, dispose of, or change the same in any way my said attorney and agent shall deem advantageous and judicious. And generally and finally to do all things in relation to the succession, administration, and settlement of my said late husband's estate in the State of Louisiana, or elsewhere, and of the State of Maryland, for me, and

in my name as his widow, in community and legatee as aforesaid, or otherwise, as fully and as effectually as I myself could do were I personally present, consenting and acting therein, I hereby ratifying and confirming all and everything my said attorney and agent shall lawfully do in the premises.

Witness my hand and seal this thirty-first day of January, in the year one thousand eight hundred & fifty-six.

(Signed) SUSAN E. HOWELL.

36 Signed, sealed, and delivered in presence of—

(Signed) JAS. B. LATINER.

(") ANN HATTON.

STATE OF MARYLAND,

City of Baltimore, ss:

I, James B. Latiner, a commissioner duly appointed and commissioned by his excellency the governor of the State of Louisiana, with authority to take depositions, acknowledgments, and proof of deeds, &c., in the State of Maryland, for the State of Louisiana, do certify that on this 31 day of January, 1856, personally appeared before me, in the city of Baltimore aforesaid, Susan E. Howell, known to me of my own knowledge to be the party constituted to the within and foregoing letter of attorney, and acknowledged the signing, sealing, and delivery of the same to be her act and deed for the uses and purposes therein mentioned. In testimony whereof I have hereunto subscribed my name and affixed my seal of office, as commissioner aforesaid, this 31st of January, 1856.

(Signed) JAS. B. LATINER,
Commissioner.

37 *Certificate of register of wills.—Filed M'ch* 31, 1856.

2nd district court, parish of Orleans.

SUCCESSION OF JOHN B. HOWELL. } No. 10053.

MARYLAND, *S. C.:*

The State of Maryland to all persons to whom these presents shall come, greeting:

Know ye that the last will and testament of John Brown Howell, of Baltimore City, deceased, hath in due form of law been exhibited, proved, and recorded in the office of the register of wills for Baltimore City, a copy of which is to these presents annexed, and administration of all the goods, chattels, and credits of the deceased is hereby granted and committed unto Susan E. Howell and Otho H. Williams, the executors by the said will appointed.

Witness James A. Reed, esq., chief judge of the orphans' court of Baltimore City, this 22d day of November, A. D. 1855.

(Signed) N. HICKMAN,
Register of Wills for Baltimore City.

38 *Letter of attorney to Otho H. Williams from Ann Eliza Williams.—Filed* 31 *M'ch*, 1856.

2d dist. court, parish of Orleans.

SUCCESSION OF }
JOHN B. HOWELL. }

Know all men by these presents that I, Ann Eliza Williams, wife of Otho H. Williams, of the city of Baltimore, in the State of Maryland, do hereby constitute and appoint my said husband, Otho H. Williams, my true and lawful attorney and agent for me and in my name as one of the coheirs and as legatee under the will of my late father, John B. Howell, who heretofore resided in the city of New Orleans, in the State of Louisiana, to take possession and control of all lands, lots, and other real estate, and of the houses and improvements thereon, in the city of New Orleans, or in any other part of the State of Louisiana, belonging to my said late father, so far as relates to my interest and estate therein as one of his legatees, heirs at law, or otherwise; and also to de-
39 mand, receive, and receipt for all moneys, legacies, shares, rents, or dividends coming or belonging to me from my said late father, or from his estate, either by law or under his will; and as my attorney and agent as aforesaid, and in my name as one of his heirs or legatees or otherwise, to sign, seal, and deliver any and every deed, bond, note, receipt, acquittance, or release which may be necessary and proper to obtain for me & for my use the possession, ownership, and enjoyment of any portion of my said late father's estate, or to sell, dispose of, transfer, or change the same in any way my said attorney and agent may deem advantageous or advisable; and generally and finally to do all things in relation to the succession, administration, and settlement of my said late father's estate in the State of Louisiana or elsewhere out of the State of Maryland for me and in my name, as one of her heirs or legatees or otherwise, as fully and as effectually as I myself could do were I present personally consenting and acting therein,
40 hereby ratifying and confirming all and everything my said attorney and agent shall lawfully do in the premises.

Witness my hand and seal this 31st day of January, A. D. 1856.
(Signed) A. E. WILLIAMS.

Signed, sealed, and delivered in presence of—
(Signed) JAS. B. LATINER,
" ANN HATTON.

STATE OF MARYLAND,
City of Baltimore, ss:

I, James B. Latiner, a commissioner duly appointed and commissioned by his excellency the governor of the State of Louisiana with authority to take depositions, acknowledgments, proofs of deeds, &c., in the State of Maryland, do certify that on the 31 day of January, 1856, personally appeared before me, in the city of Baltimore aforesaid, Ann Eliza Williams, known to me of my own knowledge to be the party constituent to the foregoing letters of attorney, & acknowledged the signing, sealing, and delivery of the same to be her act and deed
41 for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name

and affixed my seal of office, as commissioner aforesaid, this 31 day of January, 1856.

[SEAL.] (Signed) JAS. B. LATINER,
Commissioner.

Letter of attorney to Otho H. Williams from Susan Howell.—Filed M'ch 31, 1856.

2d dist. court, parish of Orleans.

SUCCESSION OF JOHN B. HOWELL. } No. 10053.

Know all men by these presents that I, Susan Howell, of the city of Baltimore, a daughter and legatee of John B. Howell, late of said city and State, deceased, in order to authorize and empower my brother-in-law, Otho H. Williams, to represent and act for me in all things relating to the estate and the succession and administration thereof
42 of my said late father in the city of New Orleans and in any other part of the State of Louisiana or elsewhere out of the State of Maryland, do hereby constitute and appoint the said Otho H. Williams my true and lawful attorney and agent for me and in my name as legatee under the will of my said late father, who heretofore resided in the said city of New Orleans, and as one of his children and heirs, to take and retain possession and control of all lands, lots, and other real estate, and of all the houses and improvements thereon, in the city of New Orleans and in the State of Louisiana belonging to my said late father at the time of his death, so far as relates to my interest therein as one of his legatees, heirs at law, or otherwise, and also to demand, receive, and receipt for all moneys, shares, rents, interest, or dividends coming to or belonging to me from him or from his estate either by law or under his will.

And as my attorney and agent, as aforesaid, and in my name
43 as one of his heirs or legatees, or otherwise, to sign, seal, and deliver any and every deed, bond, note, receipt, or release which may be necessary and proper to obtain for me the possession, ownership, or enjoyment of any portion of my said late father's estate, or to sell, dispose of, transfer, or change the same, in any way my said attorney and agent may deem advantageons and advisable, and generally and finally to do all things in relation to the succession, administration, and settlement of my said late father's estate in the State of Louisiana and elsewhere out of the State of Maryland, for me and in my name, as one of his heirs or legatees or otherwise, as fully and as effectually as I myself could do were I personally present, consenting and acting therein, hereby ratifying and confirming all and everything my said attorney and agent shall lawfully do in the premises.

Witness my hand and seal this 31 day of January, A. D. 1856.

(Signed) SUSAN HOWELL.

44 Signed, sealed, and delivered *and delivered* in presence of—

(Signed) JAS. B. LATINER.
" ANN HATTON.

STATE OF MARYLAND,
City of Baltimore, ss :

I, James B. Latiner, a commissioner duly appointed and commissioned by his excellency the governor of the State of Louisiana, with

authority to take depositions, acknowledgments, and proof of deeds, &c., in the State of Maryland for the State of Louisiana, do certify that on this 31st day of January, 1856, personally appeared before me, in the city of Baltimore aforesaid, Susan Howell, known to me of my own knowledge to be the party constituent to the within and foregoing letters of attorney, and acknowledged the signing, sealing, and delivery of the same to be her act and deed, for the uses and purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name and
45 affixed my seal of office, as commissioner aforesaid, this 31st day of January, A. D. 1856.

[SEAL.] (Signed) JAS. B. LATINER,
Commissioner.

Sale of property by Geo. May to John B. Howell.—Filed M'ch 31, 1856.

2d dist. court, parish of Orleans.

SUCCESSION OF JOHN B. HOWELL. } No. 10053.

STATE OF LOUISIANA,
Parish of Orleans:

Be it known that this day before me, Theodore Osborn Stark, a notary public in and for the State and parish aforesaid, duly commissioned and qualified, personally came and appeared George May, esq., of this city, unmarried, who declared that for the consideration hereinafter mentioned he does by these presents grant, bargain, sell, and deliver unto John Brown Howell, esq., of this here present, accepting
46 and purchasing for himself, his heirs and assigns, and acknowledging delivery and possession thereof, a certain lot of ground, together with the buildings and improvements thereon, rights, privileges, and appurtenances thereon belonging in any wise appertaining, situate in the first district of this city, on the square bounded by Gravier, Union, Carondelet, and St. Chas. streets, and designated by the number three on a plan drawn by J. Pilie, surveyor, annexed to an act passed on the 13th April, 1832, before G. R. Stringer, then a notary.

Said lots forms the corner of Gravier and Carondelet streets, and measures 25 f't front on Gravier s't, 24 f't 7 inches in width in the rear, 96 f't 1 inch in depth and front on Carondelet street, and ninety-one feet 6 inches in depth on the opposite said line, which said property was purchased by said vendor from Richard Nugent, by an act passed before Richard Brennan, notary, on the 24 of May, 1853. By reference to the annexed certificate of the recorder of mortgages of
47 this parish, it will appear that said property is free of mortgage, in the name of said George May, other than the reversion he assumed in his said act of purchase up to the amount of $14,625, and interest of the mortgage granted by R. Nugent in favor of James H. Caldwell by an act passed before said Brennan on the 21 April, 1853, to secure the payment of $19,500 and interest, which mortgage has been diminished by the payment of $9,750 and interest, and the balance is hereinafter assumed by said purchaser; said property is also subject to a lease in favor of George Cullum, acquired by him by act passed before me, notary, on the 28 August, 1854. To have and to hold the said property unto the said Howell, purchaser, his heirs and assigns, forever.

And the said May, vendor, the said property herein conveyed to the

said purchaser, his heirs and assigns, shall and will warrant and forever defend against all legal claims and demands whatsoever.

48 And the said vendor does hereby moreover transfer unto the said purchaser all and singular the rights and the actions of warranty to which he is or may be entitled against any and all former owners of the property herein conveyed, hereby subrogating the said rights and actions to be by him enjoyed and exercised in the same manner as they might have been by the said vendor himself. This sale is made and accepted for and in consideration of the price and sum of twenty-one thousand seven hundred and seven $\frac{50}{100}$ dollars (say $21,707.50), in part payment and deduction whereof the said purchaser has paid the sum of $11,957.50 in ready current money at the execution of these presents, the receipt whereof is hereby acknowledged and acquittance thereof granted by said vendor, and for the balance of said price the said purchaser hereby assumes and binds himself to pay in the place and stead of said vendor and to his acquittance two certain promissory notes for the sum of $4,785 each, drawn by Richard

49 Nugent, to the order of and endorsed by himself, dated the 21st April, 1853, and payable respectively on the 1st day of June, 1855 & 1856, with interest at the rate of six per cent. per annum, from the 1st day of June, 1853, until maturity, and eventual interest at the rate of eight per cent. per annum, which said notes (together with two others of like amount and date, payable respectively on the 1st June, 1853 and 1854, and which have been paid) were given by said Nugent to James H. Caldwell, his vendor, in part payment of the price of the herein-described property, and are secured in their payment by the mortgage which he granted on said property, per clause in his act of purchase, passed before Richard Brenan, notary, on the 21st April, 1853, which said mortgage was assumed by the present vendor, per clause in his aforesaid act of purchase, passed before Brenan, notary, on the 24 May, 1853, up to the amount of three notes therein

50 assumed by him, viz, the notes payable respectively on the 1st June, 1854, 1855, and 1856, and the reversion of said assumption is hereby taken by the present purchaser, John B. Howell, up to the amount of two notes, payable respectively on the 1st June, 1855 and 1856, herein assumed by him, the note which was payable on the 1st June, 1854, having been paid. The taxes on said property have been paid and the receipt exhibited to me, notary, and the said vendor hereby binds himself to pay his proportion of the taxes for the year 1854, to wit, from the 1st of January, 1854, up to date hereof, whenever the same shall become due and payable, whether assessed or not.

Thus done and passed in my office at the city of New Orleans, in presence of George W. Christy and Edward Allen, witnesses of lawful age, and domiciliated in said city, who sign these presents together with the said parties and me, said notary, this 25th day

51 of November, A. D. 1854.

(Original signed)

GEO. MAY.
JOHN BROWN HOWELL.
THEODORE O. STARK,
Not. Pub.

GEO. W. CHRISTY,
E. ALLEN.

REC. 1060—2

I certify the foregoing to be a true copy of the original act on file and of record in my office.
New Orleans, 29 Nov'r, 1854.
(Signed) THEODORE O. STARK,
Not. Pub.

Sale of property by the succession of Alfred F. Conrad and Francis B. Conrad to John B. Howell.—Filed M'ch 31, 1856.

2d district c't, parish of Orleans.

SUCCESSION OF JOHN B. HOWELL. } No. 10053.

STATE OF LOUISIANA,
City of New Orleans:

Be it known that this day before me, Hilary Breton Cenas, a notary public, in and for the city and parish of New Orleans, State of Louisiana, duly commissioned and qualified, personally came and
52 appeared Charles Magill Conrad, of this city, herein acting: 1st. In the capacity of administrator of the estate of Alfred Thurston Conrad, late of this city, deceased. 2d. In his capacity of testamentary executor of the last will and testament of Francis Buckner Conrad, also late of this city, deceased. 3d. And in his capacity of agent and attorney in fact of Mrs. Hannah Jane Nicholson, widow in community of the said late Francis Buckner Conrad, and also testamentary executrix of his last will and testament aforesaid, and natural tutrix of her minor children, issue of her marriage with her said deceased husband, by virtue of a power of attorney, executed by her in her said several capacities at the city of Philadelphia, on the 16th day of April, 1853, and on the same day acknowledged by her, before Edward Shipper, a commissioner of the State of Louisiana in and for the State of Pennsylvania, which power of attorney is annexed for reference to an act
53 of deposit of the same, passed before me, the said notary, on the 7th day of May, 1853; which said appearer declared that by virtue of and pursuant to two several orders of the honorable the sixth district court of New Orleans, duly rendered on the 23d day of January last, 1854, in the matters of the successions aforesaid respectively, and after the legal advertisements had been made, and all the requisite formalities duly complied with, he, the said appearer, acting in his said several capacities, caused to be exposed for sale by public auction, on the 22d day of April last, at Bank's Arcade, in this city, by George Palfrey, a duly licensed auctioneer, the property hereinafter described, owned jointly by the said successions, at which public sale the said property was by the said auctioneer adjudicated to John Brown Howell, as the last and highest bidder thereon, for the total price and
54 sum of $33,600, payable in the manner hereinafter expressed, all which will more fully appear by reference to the process-verbal of sale of the said auctioneer hereunto annexed as part hereof. Now, therefore, in consideration of the premises, and pursuant to the terms and conditions of the sale and adjudication aforesaid, he, the said Charles Magill Conrad, moreover declared that he does by these presents, in his several capacities aforesaid, grant, bargain, sell, convey, transfer, assign, and set over all legal warranties unto John Brown Howell, of the city of Baltimore, State of Maryland, here present, accepting and purchasing for himself, his heirs, and assigns, and acknowl-

edging delivery and due possession thereof, the following-described property, to wit: A certain lot or parcel of ground, together with all the buildings & improvements thereon and all the rights, privilege, and customs, ways, servitudes, and appurtenances thereunto belonging or in any wise appertaining, situate in the second district (late mu-
55 nicipality No. 1) of this city, in the square bounded by Royal, Custom-house, and Canal street and Exchange Place, measuring about 60 feet front on said Royal street, by a depth of 125 ft. more or less to said Exchange Place, on which it has a front of about 50 ft. & 10 inches, and bounded as follows, to wit, on said Royal street, on the upper line by the granite building known as "Musson's buildings," and on the lower line by the property of the "Merchants' Exchange," and on said Exchange Place, on the upper line by the property or lately belonging to O. P. Jackson, esq., and on the lower line by the said property of the "Merchants' Exchange," being the same premises which the said late Alfred Thurston Conrad and the said late Francis Buckner Conrad acquired jointly in the proportion of one undivided half each, as follows, to wit, the upper part thereof (towards Canal street), by purchase from Paul B. Martin by act passed before Theodore
56 Guyol, a notary public in this city, on the 27th day of January, 1848, and the remainder or lower part (towards Custom-house street), by purchase from the Bank of Louisiana by an act passed before Wm. Christy, a notary public in this city, on the eleventh day of January, 1849, to have and to hold the said described property and appurtenances, with all the legal warranties, unto the said purchaser, his heirs, and assigns, forever. The said vendor, in his several capacities, moreover hereby subrogating the said purchaser in and to all the rights and actions of warranty or otherwise to which the successions of the said deceased respectively now are or in any wise may be entitled against any of the former owners of the said property.

This sale is made and accepted for and in consideration of the price and sum of aforesaid $33,600, which, pursuant to the terms of the said adjudication, has been paid by the said purchaser in manner following, to wit, the sum of $8,400 in cash in lawful current money, and the
57 balance (being the remaining three-fourths of said price) in his three several promissory notes for the sum of $8,400 each, drawn to the order of and endorsed by himself, all dated on the said 22d day of April last, and made payable respectively at the Bank of Louisiana, in this city, in 1, 2, & 3 years after date, together with interest thereon at the rate of 6 % per annum from date until maturity, and if not then punctually paid, to bear interest thereafter at the rate of eight per centum per annum until final payment, all which notes after having been duly paraphed by me, the undersigned notary, to more effectually identify them with this act, were, with the said cash payment, delivered to the said vendor, who, in his said several capacities, hereby acknowledged the receipt thereof and grants acquittance therefor.

And in order to secure the full and punctual payment at matutity
58 of the said described promissory notes, together with the interest that may accrue thereon, the said purchaser hereby specially mortgages and hypothecates the said property in favor of the said vendor or of any and all future holders of the said notes, with promise not to alienate nor encumber the sum to the prejudice of this mortgage.

And as additional security in the premises the said purchaser hereby binds himself to keep the buildings on the said property fully insured until the final payment of the aforesaid promissory notes and to trans-

fer the policies to the said vendor for the use and benefit of the holders of said notes.

By reference to the annexed certificate of the recorder of mortgages in and for this parish, dated this day, it will appear that the said described and herein conveyed property is free from all lien or encumbrance whatever.

And it further appears from the necessary receipts therefor exhibited to me, notary, that all the State and municipal taxes
59 due on the said property have been paid by the said vendor.

Thus done and passed in my office at the said city of New Orleans in the presence of Auguste Commandeur and Placide Brennan, witnesses of lawful age, and domiciliated in this city, who hereunto subscribe their names, together with the said parties and me, the said notary, on this second day of May in the year of A. D. 1854, and 78th of American Independence.

Original signed:

C. M. CONRAD.
JNO. BROWN HOWELL.
H. B. CENAS, *Not. Pub.*

A. COMMANDEUR.
P. BIENVENU.

I, register of conveyance, certify that the foregoing act has been this day recorded in my office in book No. 65, fo. 48.

New Orleans May 2, 1854.

(Signed) F. B. VINOT, *Dy Kr.*

I certify the foregoing to be a true copy of the original on file and of record in my office.

In faith whereof I grant these presents under my signature
60 and the impress of my seal of office, at New Orleans, on this 8th day of May A. D. 1854.

(Signed) H. B. CENAS, *Not. Pub.*

Judgment recognizing heirs & admitting will to be recorded.—Rendered April 1, 1856.

2d dist. court, parish of Orleans.

SUCCESSION OF J. B. HOWELL. } No. 10053.

In this case submitted by consent of parties, the court having duly considered the pleadings, evidence, and law applicable thereto. It is ordered that the will and testament of John B. Howell, dated Baltimore 3d November, 1855, be admitted of record, and that Mrs. Susan B. Howell, widow of said John B. Howell, Anna Eliza Howell, wife of Otho Williams, and daughter of John B. Howell, and Susan Howell, also daughter of John B. Howell, be recognized as heirs and universal legatees of said John B. Howell, deceased.

Judgment rendered 1st April, 1856.

Signed 7th April 1856.

61 (Signed) P. H. MORGAN, *Judge.*

Petition to recognize executor and order, etc.—Filed April 21, 1881.

Civil dist. court, parish of Orleans.

SUCCESSION OF JNO. B. HOWELL. } No. 3091.

To the hon. the civil district court for the parish of Orleans:

The petition of Otho H. Williams, of Baltimore, Maryland, with respect represents that, as appears by the record herein, he, together with Susan E. Howell, was appointed executor of the last will and testament of the late John B. Howell, also of Baltimore; that the last will of said John B. Howell was duly probated in the orphans' court of Baltimore City aforesaid; that since the probate of said will Susan E., Howell, the coexecutor with petitioner, has died.

Wherefore petitioner prays that he be recognized as the sole executor of said last will and testament of said John B. Howell, and
62 be confirmed as such by this hon. court and authorized to administer upon said estate, and for general relief.

(Signed) J. O. NIXON, JR., *Att'y.*

Order.

Let the petitioner, Otho H. Williams, be recognized as the sole executor of the last will and testament of the late John B. Howell, and confirmed as such, and authorized to administer upon said estate.

New Orleans, April 21, 1881.

(Signed) F. A. MONROE, *Judge.*

UNITED STATES OF AMERICA,
State of Louisiana:

Civil district court for the parish of Orleans.

I, James T. Clark, clerk of the civil district court for the parish of Orleans, do hereby certify that the above and foregoing 43 pages do contain a full and complete transcript of the record in the succession of Jno. B. Howell, instituted in the late second district court for
63 the parish of Orleans, under the No. 10053, and transferred to this honorable court under the number 3091.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court at the city of New Orleans this 20th day of June, 1881, and in the 105th year of the Independence of the United States of America.

(Signed) JAS. T. CLARK, *Clerk.*

We, A. L. Tissot, W. T. Houston, F. A. Monroe, N. H. Rightor, and Henry L. Lazarus, judges of the civil district court for the parish of Orleans, do hereby certify that James T. Clark is the clerk of said court; that the same is a court of record, having probate jurisdiction, and that the signature James T. Clark, clerk, to the foregoing certificate is in the proper handwriting of him, the said James T. Clark, clerk, to his official acts as such full faith and credit are due and owing, and we do further certify that his attestation is in due form of law.

64 Given under our hands at the city of New Orleans on the 20th day of June, A. D. 1881.

[SEAL.] (Signed) A. L. TISSOT,
" HENRY L. LAZARUS,
Judge acting for Hon. W. T. Houston, Judge absent on leave.
" F. A. MONROE,
" N. H. RIGHTOR,
" HENRY L. LAZARUS,
Judges.

I, James T. Clark, clerk of the civil district court for the parish of Orleans, do hereby certify that A. L. Tissot, W. T. Houston, F. A. Monroe, N. H. Rightor, and Henry L. Lazarus, whose genuine signatures appear to the foregoing certificate, are now and were at the time of signing the same judges of the civil district court for the parish of Orleans, duly appointed and commissioned and qualified as such, and that said attestation is in due form of law.

Witness my hand and the seal of said court this day of , 188 .

(Signed) JAS. T. CLARK, *Clerk.*

65 Second. If you find that plaintiff gave the right of refusal or right of preference to the defendant, and the defendant notified the plaintiff of his willingness to give as much as any other person, and his willingness *to give as much as any other person, and his willingness* to make the same lease as proposed by Handy, then the same constituted a contract of lease, and the plaintiff was without authority to disregard it.

And the court having charged the jury as requested by the plaintiff, and having refused to charge the jury as requested by the defendant, counsel for the defendant then and there excepted to the ruling of the court, and tendered this bill of exceptions before the jury had retired, and prayed the court to sign the same, making it part of the record in this case, after due exhibition to counsel for plaintiffs.

(Signed) DON A. PARDEE, *Judge.*

66 *Motion and order for writ of error.—Entered & filed July 14th,* 1881.

U. S. cir. court.

O. H. WILLIAMS, EXECUTOR, *vs.* VINCENT MICAS. } 9472.

On motion of E. W. Huntington and W. S. Benedict, att'y' for defendant, Vicent Micas, and on suggesting he is informed and believes there is error to his prejudice in the final decree herein rendered and signed, that he is desirous of obtaining a writ of error therefrom as a supersedeas,

It is ordered by the court that a writ of error be allowed defendant herein from said final decree of this court returnable to the hon. the Supreme Court of the United States on the first day of its next October term, 1881, on his giving bond with solvent surety conditioned according to law in the sum of twenty thousand dollars.

Bond for writ of error.—Filed Sept'r 9th, 1881.

Know all men by these presents that we, Vincent Micas, as
67 principal, and Jas. B. Sinnott, John B. Solari, and John Fourton, as sureties, of the city of New Orleans, are held and firmly bound unto Otho H. Williams, testamentary executor of the estate of John B. Howell, deceased, in the full and just sum of twenty thousand dollars as follows: the said Vincent Micas, principal, in the sum of twenty thousand dollars; the said surety. James B. Sinnott, for the sum of ten thousand ($10,000) dollars; the said surety, John B. Solari, in the sum of seven thousand ($7,000) dollars; and the said surety, John Fourton, in the full and just sum of three thousand ($3,000) dollars, all in lawful money of the United States of America, to be paid to the said Otho H. Williams, testamentary executor of the estate of John P. Howell, deceased, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals and dated this third day of September, in the year of our Lord one thousand eight hundred and eighty-one.

68 Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein said Otho H. Williams, testamentary executor of estate of John B. Howell, is plaintiff and said Vincent Micas is defendant, being No. 9472 of docket of said court, judgment was rendered against said Vincent Micas, defendant, and the said Vincent Micas, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to said Otho H. Williams, testamentary executor of estate of John B. Howell, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Vincent Micas shall prosecute his writ to effect, and answer all damages and cost if he fail to make his plea good, then the above
69 obligation to be void; else to remain in full force and virtue.

(Signed) V. MICAS. [L. S.]
" J. B. SINNOTT. [L. S.]
" J. B. SOLARI. [L. S.]
" J. FOURTON. [L. S.]

Sealed and delivered in presence of—
(Signed) J. A. CHARBONNET,
U. S. Comm'r.

Bond approved.
(Signed) DON A. PARDEE, *Judge.*

70 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 69 pages contain and form a full, complete, true, and perfect

transcript of the record and proceedings had on the trial of the case of Otho H. Williams vs. Vincent Micas, No 9472 on the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 10th day of September, A. D 1881.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Don A. Pardee, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 10 day of September, A. D. 1181.

DON A. PARDEE, *Judge.*

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, or some of you, between Otho H. Williams, testamentary executor of the estate of John B. Howell and Vincent Micas, a manifest error hath happened, to the great damage of the said Vincent Micas, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 16th day of July, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

(Endorsed:) United States circuit court, No. 9472. Vincent Micas, pl'ff in error, versus Otho H. Williams, test'y executor estate of John B. Howell, def't in error. Writ of error. Filed July 16, 1881, T. V. Coupland, d'y clerk.

72 THE UNITED STATES OF AMERICA:

Circuit court of the United States, eastern district of Louisiana.

The President of the United States to Otho H. Williams, executor of the estate of the late John B. Howell, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a motion and order for a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Vincent Micas is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said Vincent Micas, as in said motion and order for writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of September, in the year of our Lord one thousand eight hundred and eighty-one.

DON A. PARDEE, *Judge.*

73 (Indorsed:) R. United States circuit court. No. 9472. Vincent Micas, plaintiff in error, vs. Otho H. Williams, executor of the estate of the late John B. Howell, defendant in error. Citation.

Marshal's return.

Received Sep. 9, 1881, by the U. S. marshal, and on Sept. 9th, 1881, I served a true copy of the within citation for writ of error on Otho H. Williams, executor of the estate of the late John B. Howell, defendant in error herein, by handing the same to J. O. Nixon, jr., e'q., in person, in the city of New Orleans, the said J. O. Nixon, jr., being the attorney of record for said defendant in error, and accepted service of the same.

E. S. CURRY,
D'y U. S. Marshal.

Personally appeared before me E. S. Curry, a lawful deputy of Jack Wharton, U. S. marshal for the eastern district of Louisiana, and makes oath that he served a true copy of the within writ of error on the defendants in error herein named, as set forth in his official return hereon.

E. S. CURRY,
D'y U. S. Marshal for Eastern District of La.

Subscribed and sworn before me Sept. 10th, 1881.

T. V. COUPLAND,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

(Indorsement on cover:) No. 1060. Vincent Micas, plaintiff in error, vs. Otho H. Williams, executor of John B. Howell, deceased. E. Louisiana. C. C. U. S. Filed October 15, 1881.

OFFICE SUPREME COURT U. S.
FILED
NOV 1 1881
JAMES H. McKENNEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES.

No. ——.

VINCENT MICAS, PLAINTIFF IN ERROR,

vs.

OTHO H. WILLIAMS, EXR. DEFT. IN ERROR.

Brief for Defendant in Error on Motion to Dismiss.

J. O. NIXON, JR.
JOSEPH P. HORNOR,
and FRANCIS W. BAKER,
Of Counsel for Def'dt in Error.

NEW ORLEANS, 22d October, 1881.

L. Graham & Son, Book and Job Printers, 127 Gravier st.

IN THE SUPREME COURT OF THE UNITED STATES.

No. ——.

VINCENT MICAS, PLAINTIFF IN ERROR,

vs.

OTHO H. WILLIAMS, EXR. DEFT. IN ERROR.

Brief for Defendant in Error on Motion to Dismiss.

Williams having leased certain premises in New Orleans to plaintiff in error, and said lease having expired on 31st May, 1881, brought this action to eject Micas, alleging that although duly notified to leave, said Micas refused to vacate the premises, and continues to occupy them.

For answer, Micas admitted that he had occupied the premises up to 31st May, 1881, under the lease from Williams, and averred that since that date he held them under a verbal lease, previously made to him by Williams, on the terms and conditions set forth in a certain written lease of the same premises made by Williams to one Thomas H. Handy, agent for Wm. McQuoid, for fifteen years from said 31st May, 1881.

There was a verdict and judgment against Micas evicting him from the premises, and he has sued out

this suit of error, which defendant in error now moves to dismiss on the following grounds:

1st. That the amount in controversy is not sufficient to give this Court jurisdiction.

2d. That under the laws of Louisiana (Revised Statutes 2157), the plaintiff in error cannot have the judgment herein reviewed, because he did not file a special defence supported by his oath, that all the facts contained in his answer were true, and entitled him to retain possession of the premises sued for.

And defendant in error further moves this Court to affirm the judgment of the lower Court, on the grounds, that although the record may show that this Court has jurisdiction, it is manifest that the writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument; for the reason that there is nothing in the record, and no such bills of exception, upon which error can be assigned.

I.

On the face of the pleadings there is nothing involved in this suit save the *possession* of the premises, and the pleadings do not show what that possession is worth. Nothing is decided by the judgment except that Micas must deliver up that possession to Williams. Were there nothing else to be considered, the motion to dismiss must prevail, and there is, we contend, nothing else in the record which this Court can consider.

There appears in the transcript an affidavit made by the plaintiff in error, and filed without notice to us, after the judgment became final, to the effect "that the

value of the matter in dispute therein exceeds the sum of five thousand dollars;" but we cannot imagine that the jurisdiction of this Court is to be ascertained, fixed and determined by such a bare *ipse dixit* of the plaintiff in error, and we believe that this Court will require something more than that to convince it that it has the power to revise the judgment of the lower Court. If we were wrong in this, then your Honors would be obliged to take jurisdiction of every case that came before you, wherein the plaintiffs in error believed that their interests were involved to the appellate amount.

We have seen that the "matter in dispute" is the possession of the premises, how does the plaintiff in error establish that that possession is of the value of five thousand dollars? He does not give the Court any particulars whatever; he does not describe what use he puts said premises to; nor the amount or the extent of the business, if any, that he does therein; nor the value of the premises; nor any specific reason why their simple possession should be worth so much. He does not show whether that possession would be worth so large a sum to any one, or merely to himself. We may well take it for granted that mere fancy or sentiment endears to him such possession, and gives it, therefore, so great a value, but if that value is thus derived, surely it is not such a valuation as will invest this Court with jurisdiction.

It appears from the affidavit that this is only the estimate of the plaintiff in error of the value of matter in dispute, but we think the Court should not be content with this; not only should Micas have explained in his affidavit the reason of such valuation, but he should

have supported it with affidavits of others to that effect if he could, and that he did not is good reason to believe that he could not, and that the valuation is purely fictitious.

Moreover, the affidavit is most vague and uncertain in another respect. Micas does not describe what he contends to be "*the matter in dispute;*" he does not say it is the possession of the premises, or for what length of time, or upon what conditions; or whether it is because the judgment affects "the matter in dispute," so far as may concern a probable or possible subsequent suit for damages that he may have against Williams, or so far as it may affect his rights collaterally in any manner; and if the valuation is made by him, because of any of these reasons, then it is no such valuation as will give this Court jurisdiction.

"If jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount.' Troy vs. Evans, 97 U. S., 3.

We agree that in such a case as the present, it is proper to show by affidavits that the Court has jurisdiction; it was so held in Richmond vs. Milwaukee, 21 Howard, 392; quoting Cruse vs. Steadman, 4 Dallas, 22; and Williamson vs. Kincaid, 4 Dallas, 19; but in these two last named cases, the supersedeas was denied; however, such showing should be by satisfactory affidavits, detailing circumstances and particulars, which contribute to make "the matter in dispute" so valuable, and such affidavits should be made by other parties

than the plaintiff in error, or at least his opinion duly sworn to should have some extraneous support to give it that credit which it must lack, from the force of circumstances, while it stands alone upon the record. And more particularly should this be the rule, because necessarily all such affidavits must be taken *ex parte*, and defendant in error have no right to make or file counter affidavits, which was otherwise when the old rule 13 was in force See 1 Cranch, 7; Phillip's Practice, p. 81.

II.

Section 2157 of the Revised Statutes of Louisiana provides that: "No appeal from any such judgment shall suspend execution unless the defendant has filed a special defense, *supported* by his oath, that all the facts contained in his answer are true, and entitle him to retain the possession of the premises, etc."

1st. The plaintiff in error, being defendant in the suit below, made no such affidavit; the only defense made by him is that contained in his answer which was filed without any affidavit appended thereto, or in any manner connected therewith, on 22d of June, 1881. It is true, that on the same paper on which the answer is written is a certificate that seven days after the filing the plaintiff in error appeared before a commissioner and swore to it, but that certificate *was never filed*; that addition to the answer and to the record was made without any leave of Court first had, nor was such act in any way ratified thereafter by the Court; and being thus an amendment of the pleadings made without notice and without leave, it should not be considered.

Such amendment proposed to confer upon the plaintiff in error a right to an appeal which he had forfeited by omitting it, and he could not thus amend the record without leave to correct such omission.

2d. But if we are wrong in the above proposition, and we cannot see how this Court can countenance an amendment of the record made without leave, then plaintiff in error was not entitled to his writ, because he has not sworn that the special defence set up by him in his answer, "*entitled him to retain possession of the premises*," and the statute makes these words sacramental.

3d. Moreover, not only has he failed to swear that his special defense "entitles him to retain possession of the premises," but that special defense shows clearly from its allegations that he was not entitled to retain such possession, for he alleges that that is impossible, averring that he had a verbal lease of the premises on the same condition as those of a written lease made for the same period, of the same premises, to an entirely different party, and which he annexes a copy of to his answer. If the plaintiff below had rented the premises to another party by a written lease as alleged by Micas, and had verbally promised to rent them to him on the same terms, it follows that plaintiff below had not complied with said verbal promise, and might possibly, therefore, be held in damages by Micas, for not doing so, but could not be held to have rented the premises to Micas.

III.

Our motion to affirm needs but little argument—the face of the record shows that the writ of error was

taken purely for delay, and to enable plaintiff in error to occupy our premises, without compensation, for the very considerable period of time that cases are known to remain in this Court pending and undecided on account of the crowded state of its docket.

The only points which have been reserved by the plaintiff in error in his bill of exceptions are such as this Court cannot possibly pass upon, even should this case be reached upon the merits, because none of the facts upon which the charge of the Court is based are contained in the bill, and therefore it is impossible for your Honors to say whether the lower court erred or not, because plaintiff in error cannot state anything as an assignment of errors in which any of the charges of the lower court to the jury were erroneous; *non constat* that a state of facts existed from the evidence which would have justified any charge that the Court may have made. See General Rules No. 21, section 4, sub-section 2.

"An assignment of error which alleges simply that the Court below erred in giving the instructions which were given to the jury in lieu of the instructions asked for—it not being stated in what the error consisted, or in what part of the charge it is—is an insufficient assignment under the 21st rule of Court." Lucas vs. Brooks, 18 Wallace, 436.

"The Court is never required by law to give an instruction to the jury which is not applicable to the case, even though it be correct as an abstract principle or rule of law; and it may be added that no prayer for instruction, whether presented by the plaintiff or the defendant, can be regarded as applicable to the

case when it is wholly unsupported by the evidence introduced to the jury." Insurance Company vs. Burwig, 20 Wallace, 161.

There is nothing in the record of this case to show that there was *any evidence before the jury on behalf of plaintiff in error*, and if plaintiff in error has failed to bring up any statement of the facts upon which the lower court acted, he can neither ask or have any relief from this Court.

"This mode of drawing up a bill of exceptions is defective, as the material facts or proofs on which the instructions rest should be inserted before the instructions, in order that we may see if the points arise on which they are given, and to which exception is taken."

United States vs. Morgan, 11 Howard, 158.

"A bill of exceptions ought to state that evidence was offered of the facts upon which the opinion of the Court was prayed." Chief Justice Marshall in Vosse vs. Smith, 6 Cranch, 226.

"Judgment will not be reversed because the Court refused to give a charge, abstractly correct, but which the bill of exceptions does not show was pertinent to the case on trial."—U. S. vs. Cases of Wine, 1 Woods, 47.

"All testimony upon which the charges is based must be incorporated in the bill of exceptions when the party wishes to review the charge upon writ of error." —Ibid, p. 50.

The bill of exceptions in the record cannot commend itself to the favorable consideration of the Court for another reason. It sets out that the Court gave three charges to the jury as asked by the plaintiff below,

and refused the charges asked for by the defendant below, and concludes: "And the Court having charged the jury as requested by the plaintiff, and having refused to charge the jury as requested by the defendant; counsel for the defendant then and there excepted to the ruling of the Court and tendered this bill of exceptions, before the jury had ~~returned~~ retired and prayed this Court to sign the same, making it a part of the record in this case after due exhibition to counsel for plaintiff." It thus comes within the rulings of this Court that where a series of propositions are embodied in instructions to the jury, and the instructions are excepted to in a mass, if any one of the propositions is correct, the exception must be overruled (Brogher vs. Insurance Co., 103 U. S. 98), and that where a charge is asked embodying several propositions, and is refused, if any one of the propositions is erroneous, the ruling of the lower court will be affirmed. (United States vs. Hough, 103 U. S. 72, 73).

The first charge asked by plaintiff was in substance that if the jury found that it was the intention to reduce to writing any contract of lease that should be made of the premises in question, and such contract was not reduced to writing, then there was no lease to the defendant, and plaintiff must have a verdict.

See Wolf vs. Mitchel, Craig & Co., 24 An. 433.

The second charge asked by plaintiff was that the promise to give a preference of the refusal of a proposition to lease to be made by some unknown person and of uncertain terms, is not a lease and cannot be enforced as such. The textual provisions of the Civil Code of Louisiana, determine this question.

Article 2670. To the contract of lease as to that of sale three things are absolutely necessary—to-wit: the thing, the price and the consent.

Article 2672. The price, notwithstanding, may be left to the award of a third person named and determined, and then the contract includes the condition that this person shall fix the price; and if he cannot and will not do it, there is no lease.

The contract would be null if the price were left to be fixed by a person not designated.

And the third charge asked by the plaintiff is that if the jury find that the plaintiff promised without consideration to give the defendant the right to refuse or to accept a proposition to be made in the future by another person, this is not a contract.

The several articles of the Louisiana Code above cited show the correctness of this charge.

Here are three charges excepted to in mass, all of which are clearly correct, and embody elementary legal truths. If the Court, however, finds but one of them correct, the exception to the whole cannot stand.

Of the charges asked by the defendant below, the first is that "it was incumbent upon the plaintiff to prove his authority to appear in Court, which authority is specially at issue, and as he has not done so, you will find for defendant."

The Court refused this because it was an issue to be determined *in limine* and was not before the jury. The defendant had already come into Court and filed an exception, denying the right of the plaintiff in virtue of the authority granted him in Maryland as executor, to sue in Louisiana. That exception had been overruled,

and defendant had answered to the merits; it is therefore perfectly obvious that the capacity of the plaintiff and his right to sue as executor was not a matter for the jury at that time. In any event, it was a matter of law for the Court, and could not be a matter of fact for the jury.

The substance of the second charge asked by the defendant and refused by the Court, is that if the plaintiff gave the right of refusal, or the right of preference to the defendant, and the defendant notified the plaintiff of his willingness to give as much as any other person, and of his willingness to make the same lease as proposed by Handy, then the same constituted a contract of lease. The illegality of this proposition is also shown by the articles of the Louisiana Code above cited.

So that here are two instructions asked, both erroneous, and the refusal to give the two is excepted to in the same bill. If either was wrong, the action of the lower court was right.

The exception filed by the defendant below, in the nature of a demurrer, to the effect that the plaintiff was without right to sue, in virtue of his authority as executor, granted in the State of Maryland, is as readily disposed of. On the trial thereof plaintiff showed a judgment of the Civil District Court for the Parish of Orleans, the Court of competent jurisdiction, recognizing him as executor of the estate of the late John B. Howell, and authorizing him to administer upon said estate. That judgment cannot be collaterally questioned in this proceeding; and the plaintiff

was and is authorized to administer upon the estate of Howell until that judgment is annulled or reversed; and in no case where a foreign executor has been so recognized and so empowered to administer, has his authority been allowed to be drawn in question collaterally.—See Ball vs. Ball, 15 La., 173.

There are cases where a foreign executor, never recognized nor empowered by the Courts of Louisiana, has been refused the right to sue for debts due his testator when he placed such right simply upon his title as foreign executor, but there is no precedent for the practical anullment of a judgment empowering such executor to act in this State, by the refusal to allow him to sue even for a debt due his testator.

But there are two other considerations that are conclusive:

1. Plaintiff alleges that up to June 1, 1881, defendant had occupied certain premises in New Orleans under a written lease, which he annexes to his petition. That lease is made by Otho H. Williams, executor of the estate of John B. Howell, to V. Micas, defendant below. In that lease Micas covenants to deliver up the possession of the leased property on its expiration. He has not done so and the lessor now sues him to enforce that provision of the contract, thus bringing the case clearly within the principle of law that although as a general rule foreign executors cannot sue in courts of another State, yet such principle only applies where the suit is based upon a transaction with the testator during his lifetime or where the executor sues for a debt due the testator, and not to cases where the executor sues upon a contract made with himself

as executor.—See Lawrence vs. Lawrence, 3 Barbour Chancery (N. Y.) 71, and Trotter vs. White, 10 Smedes and Marshall, (Miss.,) 607.

2. In his answer the defendant below admitted the execution of the lease annexed to the petition which expired June 1, 1881. That lease was made to him by Williams as executor; and he further set up that he he was entitled to remain in possession by virtue of a certain lease made to him by the plaintiff under a certain renewal made and effected with said plaintiff, and avers that he has taken steps to force the said plaintiff to sign the alleged verbal lease. Under his answer he claims the right to occupy the premises by virtue of a lease made by the plaintiff in the suit below, who is Otho H. Williams, executor of the estate of John B. Howell. How can he then, such an answer being in the record, claim that Williams as executor, cannot sue him for the possession of the identical premises of which he claims he has a lease from Williams as executor?—See Boston Belting Company vs. Simonds, 22 Louisiana Annual, 75. State vs. Breed's Securities, 10 Louisiana Annual, 492. Duchamp, et al., vs. Nicholson, 2 New Series (Louisiana), 678.

We think that the motion to affirm should be granted under the authority of Hinckley vs. Morton, 103 U. S., 764. Whitney vs. Cook, 99 U. S., 607; and Moore vs. Simonds, 100 U. S., 145.

V.

As this writ of error has been so evidently "sued out merely for delay," and has delayed "the proceedings

on the judgment of the inferior Court," we ask that we have damages as for a frivolous appeal, under the second section of Rule 23; and in accordance with the declaration made by your Honors in Whitney vs. Cook, 99 U. S., 607.

All of which is respectfully submitted,

J. O. NIXON, JR.
JOSEPH P. HORNOR,
and FRANCIS W. BAKER,
Of Counsel for Def'dt in Error.

NEW ORLEANS, 22d October, 1881.

SUPREME COURT, U.S.
FILED
DEC 12 1891
J. McKENNEY, CLERK

Supreme Court of the United States.

VINCENT MICAS,
PLAINTIFF IN ERROR,
vs.
OTHO H. WILLIAMS, Ex. J. B. HOWELL.

No. 1060.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Brief of Counsel of Plaintiff in Error on Motion of Counsel of Defendant in Error to Dismiss and Affirm.

The petition of defendant in error, filed in the court below, shows on its face that court to have been without jurisdiction: first, because the petitioner did not aver himself to be a citizen of any State; and, second, because he did not aver that the amount in controversy exceeded five hundred dollars. This court must maintain the writ of error to pass upon these two questions, no matter what other things, good or bad, may be said upon other points.

The first ground assigned by defendant in error in his motion to dismiss is, "that the amount in controversy is "not sufficient to give this court jurisdiction."

To this we reply that the lease of the premises marked C,

part of plaintiff in error's sworn answer in the court below, shows the matter in controversy to be the right claimed by plaintiff in error to occupy certain premises for fifteen years at a yearly rent of $3,500, in all $52,500, (Rec., pp. 5 and 6,) and the judge of the court below required plaintiff in error to give bond and security to stay execution in the sum of $20,000. As a matter of caution we ask leave to file the affidavits of Micas, the plaintiff in error, of Edward Fehrenbach, and of George Paleton, showing that the value in dispute greatly exceeds the appealable amount.

The second ground assigned by defendant in error in his motion to dismiss is, "That under the laws of Louisiana " (Revised Statutes, 2157) the plaintiff in error cannot have " the judgment herein reviewed, because he did not file a " special defence, supported by his oath, that all the facts " contained in his answer were true, and entitled him to re- " tain possession of the premises sued for."

To this we answer:

1st. That plaintiff in error *did* file a special defence in the court below.

See his answer, Record, p. 5.

2d. That his said answer *is* supported by oath, and makes a substantial compliance with the requirements of the Louisiana statute quoted on page 5 of "brief for defendant in " error on motion to dismiss." Plaintiff in error signed his answer in the court below—as well as his counsel there—and swears to it. His oath to the facts of his answer means " that all the facts contained in his answer are true," as the statute requires; and as among the facts thus alleged and sworn to appears this allegation that "he commenced a new " lease with the plaintiff" of the premises before the expira-

tion of the old one, "and has taken proper action to enforce "the compliance of said agreement of renewal"—these facts show him to be entitled to retain the possession of the premises. So the Louisiana statute, if governing here, has been substantially complied with. The objection that the affidavit of plaintiff in error is seven days posterior in date to the filing of his answer is surely of no force; the statute says the answer must be *supported* by affidavit, and the interval between the two days does not weaken the support.

3. The Louisiana statute does not bar an appeal for want of compliance with its provisions; it merely bars the right to stay execution by appeal where there is no such compliance. This writ of error cannot be dismissed even if the defendant in error has a right to take out execution in the court below.

4. The right of plaintiff in error to the writ depends on the laws of the United States and not on those of Louisiana; and he is clearly within the terms of the former.

We submit, then, that this court has jurisdiction.

But the defendant in error further says that, admitting this court has jurisdiction, "it is manifest that the writ of "error was taken for delay only, and that the question on "which the jurisdiction depends is so frivolous as not to "need further argument," and for support of this statement it is alleged "that there is nothing in the record, and no such "bills of exception upon which error can be assigned." (Brief of def't in error, p. 2.) We shall not confine ourselves in assigning error to the points reserved by bill of exception in the court below, but assign also those we indicate in the opening of this brief.

But the points reserved by exception cannot be deemed so frivolous as to require no further argument. The amend-

ment of rule 6 of this court, which provides for the disposal of frivolous questions involving jurisdiction, means questions of such light and trifling importance that he who should raise them would be considered a mere fribbler. What do we find in the record? A controversy of an important character in regard to value, involving to the plaintiff in error some fifty thousand dollars; this is certainly no trifle. An executor bringing an action of ejectment; this is not a frequent spectacle. The right of such executor to sue at all under Louisiana law, the jurisdiction of the circuit court, as shown or not by the face of the petition filed therein—all of these are serious questions.

The brief of counsel of defendant in error discusses the perspective of the case here, and seeks to show (see pp. 7 and following of his brief) that error cannot properly be assigned by us in our argument on the merits, but such a discussion is premature. What we have now to debate is whether there are in the record important questions falling within this court's jurisdiction. And we deem what we have said sufficient to show that there are.

If, as we contend, the questions presented by the record are grave and important, and mere mention of them shows they are such, then it cannot be properly said that our writ of error was taken merely for delay.

Respectfully submitted.

THOMAS J. DURANT,
for Pl'ff in error.

DEC. 8, 1881.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 196.

JACOB S. [illegible], PLAINTIFF IN ERROR,

vs.

JOHN H. TICE.

IN ERROR TO THE SUPREME COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JUNE 14, 1870.

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If, as we contend, the questions presented by the record are grave and important, and mere mention of them shows they are such, then it cannot be properly said that our writ of error was taken merely for delay.

Respectfully submitted.

THOMAS J. DURANT,
for Pl'ff in error.

DEC. 8, 1881.

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Book

Filed

Jan 6 1880

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 198.

JACOB S. MERRELL, PLAINTIFF IN ERROR,

vs.

JOHN H. TICE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JUNE 14, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 198.

JACOB S. MERRELL, PLAINTIFF IN ERROR,

vs.

JOHN H. TICE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, at the September term, 1878, thereof, between John H. Tice, plaintiff, and against Jacob S. Merrell, defendant, a manifest error hath happened, to the great damage of the said Jacob S. Merrell, defendant, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this seventh day of January, in the year of our Lord one thousand eight hundred and seventy-nine.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[SEAL.] M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri.

Allowed by—

JOHN F. DILLON, *Judge.*
By A. P. SELBY, *Deputy.*

2 *Return to writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of St. Louis, this 28th day of of January, A. D. 1879.

[SEAL.] M. M. PRICE,
Clerk of said Court.
By A. P. SELBY, *D. C.*

(Indorsed:) No. United States circuit court, eastern district of Missouri. John H. Tice vs. Jacob S. Merrell. Writ of error. To the circuit court of the United States, eastern district of Missouri. Returned and filed, day of 187 , , clerk.

3 The United States of America to John H. Tice, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein Jacob S. Merrell, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John F. Dillon, judge of the circuit court of the United States for the eastern district of Missouri, this 7th day of January, in the year of our Lord one thousand eight hundred and seventy-nine.

JOHN F. DILLON,
Judge United States Circuit Court, Eastern District of Missouri.

Service of citation is hereby acknowledged this 3d Feb'y, 1879.
ROBT. E. COLLINS,
Attorney for Plaintiff.

4 (Indorsed:) United States circuit court, eastern district of Missouri. John H. Tice vs. Jacob S. Merrell. Citation. Filed 187 , , clerk.

5 THE UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Be it remembered that heretofore, to wit, on the 16th day of February, 1878, there was filed in the office of the clerk of the circuit court of the United States in and for the eastern district of Missouri a certain petition, which is in the words and figures following, to wit:

Petition.

UNITED STATES OF AMERICA:

Circuit court of the United States, eastern district of Missouri, March term, A. D. 1878.

JOHN H. TICE, PLAINTIFF,
vs.
JACOB S. MERRELL, DEFENDANT.

The plaintiff, John H. Tice, by his attorneys, Hill and Collins, for cause of action against Jacob S. Merrell, the defendant, says that he is a citizen of the United States of America, and a resident of the State of Missouri, and of the eastern district thereof; and that said defendant is also a resident citizen of the State of Missouri, and of said district. Plaintiff avers that in the month of November, A. D. 1876, he published, in the form of foot-notes to an almanac for the year A. D. 1877, forecasts of probable weather for each day of the year 1877; that said foot-notes of probable weather were original with the plaintiff in their design and general arrangement, and the result of plaintiff's long-continued scientific research, and by him first made known to the public.

Plaintiff further states that in the month of November, 1876, he filed in the office of the Librarian of Congress an almanac for the year 1877,

in which almanac were published, in the form of foot-notes, said forecasts of probable weather for each day of the year 1877, and for which foot-notes the plaintiff, after a full compliance with the act of Congress in such cases made and provided, obtained a copyright
6 therefor. Plaintiff further states that soon after he had secured said copyright, as aforesaid, said defendant wrongfully and illegally commenced an infringement of the rights so secured by the plaintiff in this, that in the month of December, A. D. 1876, or thereabouts, the said defendant published an almanac called "Merrell's Almanac," meaning thereby the defendant, in which the defendant published under the title of "Probable Weather," in the form of foot-notes, consisting of forecasts of probable weather for each day of the year 1877; that in the publication of said foot-notes the said defendant copied substantially the substance of the foot-notes of probable weather as those published by the plaintiff, and for which plaintiff had secured a copyright as aforesaid.

And plaintiff further avers that said defendant did, with the intent to wrong and injure the plaintiff, print and publish substantially the foot-notes as those originated and published by the plaintiff, and for which he had secured a copyright as aforesaid; that said defendant in violation of plaintiff's rights as aforesaid, and without authority therefor, printed and published many hundred thousand copies of the foot-notes of forecasts of probable weather for each day of the year as aforesaid. Wherefore plaintiff avers that, in consequence of the wrong and injury complained of, he has sustained damages in the sum of five thousand dollars, and prays judgment for that amount.

And for a further and other cause of action John H. Tice, plaintiff, complains of Jacob S. Merrell, defendant, and says that the plaintiff is a citizen of the United States of America, and a resident citizen of the State of Missouri and of the eastern district thereof, and that said defendant is also a resident of the State of Missouri and the eastern district thereof, in the city of St. Louis.

Plaintiff further avers that in the year 1877 he originated
7 certain forecasts of the weather for every day in the year, based upon astronomical occurrences for the year 1878; that said forecasts of probable weather were published by the plaintiff in the form of foot-notes to an almanac published by the plaintiff for the year A. D. 1878; that with the view of securing to plaintiff the benefit that might arise from his said forecasts of weather as aforesaid, and before the same had been by him published and made public, plaintiff, upon a full compliance with the requirements of sections 4956–4957 of the Revised Statutes of the United States, in regard to the securing of copyrights, obtained in due and legal form a copyright for said forecasts of probable weather as aforesaid.

Plaintiff further states that soon after he had so secured his copyright as aforesaid, said defendant wrongfully and illegally commenced an infringement of the rights secured to the plaintiff by said copyright, in this, that in the months of January and February, A. D. 1878, said defendant published an almanac for the year 1878, called "Merrell's Almanac, 1878," meaning an almanac published and owned by the defendant, in which the defendant printed and published in the form of foot-notes, under the title of "Weather Conjectures," forecasts of probable weather for each day of the year 1878; that in the printing and publishing of said foot-notes the defendant copied substantially the substance of the foot-notes of probable weather as those for which the plaintiff had previously secured his copyright as aforesaid.

And plaintiff further avers that the defendant, with the intent to wrong and injure the plaintiff, has printed and published a very great number of all the forecasts of probable weather for each day of the year 1878 so originated and copyrighted by the plaintiff, and that the defendant still continues to print and publish other copies of the same.

8 Wherefore plaintiff avers that in consequence of said wrong and injury he has sustained damage in the sum of five thousand dollars, and prays judgment for that amount.

HILL, MOULTON & COLLINS,
Attorneys for Plaintiff.

And thereupon a summons was issued, which is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

In the circuit court of the United States in and for said district.

The President of the United States of America to the marshal of the United States in and for said district, greeting:

You are hereby commanded to summon Jacob S. Merrell, a citizen of the State of Missouri, that he be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of March next, then and there to answer the complaint of John H. Tice, a citizen of the State of Missouri, as set forth in the petition filed in said court on the sixteenth day of February, A. D. eighteen hundred and seventy-eight.

Hereof fail not, and have you then and there this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 18th day of February, A. D. eighteen hundred and seventy-eight.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] M. M. PRICE, *Clerk*,
By T. L. CRAWFORD, *Deputy.*

Endorsed on said writ was the following return of service, to wit:

9 *Return.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

I have executed this writ by delivering a copy thereof, together with copy of the petition thereto attached, to the within named Jacob S. Merrell, at St. Louis, in said district, this 18th day of February, 1878.

H. W. LEFFINGWELL,
United States Marshal Eastern District of Missouri,
By JAMES B. GEGGIE, *Deputy.*

And afterwards, to wit, at the March term, 1878, of said court, and

on the 21st day of March, the defendant filed a demurrer to petition, which is in words and figures following, to wit:

Demurrer to petition.

UNITED STATES OF AMERICA.

Circuit court of the United States for the eastern district of Missouri, March term, A. D. 1878.

JOHN H. TICE, PLAINTIFF,
vs.
JACOB S. MERRELL, DEFENDANT.

Now comes Jacob S. Merrell, the defendant in the above-entitled cause, and demurs to the plaintiff's petition therein, as follows, viz:

1st. To the first count thereof he demurs on the ground that the same does not state facts sufficient to constitute a cause of action, in this, that it does not aver that the plaintiff before the publication of the forecasts in the form of foot-notes to his almanac for the year 1877, mentioned in his said first count, delivered at the office of the Librarian of Congress, or deposited in the mails, addressed to the said librarian at Washington, District of Columbia, a printed copy of the
10 title of said almanac, or of the said forecasts; nor does it aver that he did within ten days from the publication of said almanac or forecasts deliver at the office of the said librarian, or deposit in the mail, addressed to the said librarian, at the said place, two copies of the said almanac, or of the said forecasts, within ten days after the publication of the same; nor does it aver any facts showing an infringement by the defendant of any copyright for said almanac or said forecasts secured to the plaintiff under the act of Congress in such cases made and provided.

2nd. And to the second count of said petition the said defendant demurs on the ground that the said count does not state facts sufficient to constitute a cause of action, in this, that it does not aver that before the publication by the plaintiff of the forecasts of probable weather, therein alleged to have been published by him in the form of foot-notes to an almanac for the year 1878, the plaintiff delivered at the office of the Librarian of Congress, or deposited in the mail addressed to said librarian at Washington, District of Columbia, a printed copy of the title of said almanac or of the said forecasts; nor that within ten days from the publication of said almanac or of said forecasts he delivered at the office of said librarian, or deposited in the mail addressed to the said librarian at the said place, two copies of said almanac or of said forecasts; nor does it aver any facts showing an infringement by the defendant of any copyright of the plaintiff securing to him the said almanac or forecasts under and by virtue of the said act of Congress in such cases made and provided for.

P. E. BLAND &
CHAS. E. DOW,
Att'ys for Def't.

11 And afterwards, at said March term of said court, and on the 30th day of said month, the following proceedings were had in said cause, to wit:

Demurrer sust'd.

JOHN H. TICE, PLAINTIFF,
vs.
JACOB S. MERRELL, DEFENDANT.

Now come the parties, by their attorneys, and the court having considered the demurrer to the petition heretofore filed herein, and being fully advised thereof, orders that said demurrer be, and the same is hereby, sustained; and thereupon, on motion of his attorney, leave is granted said plaintiff to amend his petition.

And afterwards, on the 6th day of April, 1878, the plaintiff, by leave of court, filed his amended petition, which is in the words and figures following, to wit:

Amended petition.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States for the eastern district of Missouri.

JOHN H. TICE, PLAINTIFF,
vs.
JACOB S. MERRELL, DEFENDANT.

John H. Tice, plaintiff herein, by Hill & Collins, his attorneys, comes now, and, by leave of court first had and obtained, files this his amended petition, and for cause of action against the defendant, Jacob S. Merrell, says:

That plaintiff is a citizen of the United States of America and a resident citizen of the State of Missouri and of the eastern district thereof; that the said defendant is also a citizen of the said United States and a resident citizen of the said eastern district of Missouri.

Plaintiff avers that on the 13th day of November, in the year
12 1876, plaintiff, before the publication of the book hereinafter mentioned and described, delivered at the office of the Librarian of Congress, at the city of Washington, in the District of Columbia, a printed copy of the title of the book hereinafter referred to and described, the title or description of which is in the following words, to wit: "Professor Tice's Almanac for the year 1877, with forecasts of the weather for every day, based upon the theory that there are meteorological cycles that are fixed and determined by astronomical events. According to this theory, there are four points on the ecliptic which no planet can pass without creating electrical disturbances, that effect the whole solar system. Each planet, therefore, in every revolution on its orbit, occasions four meteorological cycles. St. Louis, Mo."

That afterwards, and on the 29th day of November, 1876, plaintiff published the said book, the title of which is hereinbefore given; that on the 2d day of December, 1876, and within ten days from the publication of said book as aforesaid, plaintiff deposited, or caused to be deposited, in the mail at the city of St. Louis, Missouri, addressed to the Librarian of Congress, at Washington, District of Columbia, postage prepaid, two printed copies of the said book.

Plaintiff avers that in said book he published, and the same contained, in the form of foot-notes to an almanac for the year 1877, forecasts of probable weather for each and every day of the said year 1877; that said foot-notes of probable weather were original with the plaintiff in their design, composition, and general arrangement, and were the result of plaintiff's long-continued and laborious scientific research, and were by him first made known to the public; that by and on account of the premises, all of which was done strictly in accordance with the act of the Congress of the United States in such cases made and
13 provided, the plaintiff became and was entitled to a copyright of the said book, and thereby the same was copyrighted, and under the provisions of the said act of Congress plaintiff thereby acquired the sole and exclusive liberty and right of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the said book or almanac, and all the same contained, and more particularly the said foot-notes to said almanac, being forecasts of probable weather for each and every day of the year 1877; that plaintiff gave notice of such copyright by inserting in each of the several copies of said book which were by him published, on the title page of each, the following printed words, to wit: "Entered according to the act of Congress, in the year 1876, by John H. Tice, in the office of the Librarian of Congress, at Washington. All rights reserved," in accordance with the said act of Congress in such cases made and provided.

Plaintiff further states that soon after he had secured the said copyright of said book as aforesaid, and given notice thereof as aforesaid, the defendant wrongfully and illegally commenced an infringement of the rights so and thereby secured to the plaintiff, in this, to wit, that in the month of December, 1876, or thereabouts, the defendant published a book called "Merrell's Almanac," meaning thereby the defendant, in which said defendant published under the title of "Probable Weather," in the form of foot-notes, consisting of forecasts of probable weather for each day of the year 1877; that in the publication of said foot-notes defendant copied substantially the substance of the foot-notes of probable weather published by plaintiff in the book aforesaid, and for which plaintiff had secured a copyright as aforesaid; and plaintiff further avers that said defendant did, with the intent to wrong and injure the plaintiff, print and publish substantially the same foot-notes as those originated, printed, and published by plaintiff in said book, and
14 for which he had secured a copyright as aforesaid; that defendant, in violation of plaintiff's rights as aforesaid, and contrary to the statute in such cases made and provided, and without the authority or consent of plaintiff, printed and published many hundred thousand copies of the said "Merrell's Almanac," containing copies of said foot-notes of forecasts of probable weather for each day of the year aforesaid, and for which plaintiff had secured a copyright as aforesaid; and plaintiff avers that in consequence of the wrong and injury complained of he has sustained damage in the sum of five thousand dollars.

Plaintiff further avers that the matter herein complained of is one of which this honorable court has exclusive original jurisdiction. Wherefore plaintiff prays for judgment against the defendant in the sum of five thousand dollars, and for his reasonable costs.

And for a second count and further cause of action against the said defendant, plaintiff says that plaintiff is a citizen of the United States of America, and a resident of the State of Missouri and of the eastern district thereof; that the defendant is also a citizen of the said United States, and a resident citizen of the said eastern district of Missouri.

Plaintiff avers that on the 20th day of October, in the year 1877, plaintiff, before publication of the book hereinafter mentioned and described, delivered at the office of the Librarian of Congress, at the city of Washington, in the District of Columbia, a printed copy of the title of the book hereinafter referred to and described, the title or description of which is in the following words, to wit:

"Professor Tice's Almanac for the year 1878, with forecasts of the weather for every day, based upon the theory that there are meteorological cycles that are fixed and determined by astronomical events. According to this theory, there are four points on the ecliptic which no planet can pass without creating electrical disturbances that ef-
15 fect the whole solar system. Each planet, therefore, in every revolution on its orbit, occasions four meteorological cycles. St. Louis, Mo."

That afterwards, and on the 27th day of November, 1877, plaintiff published the said book, the title of which is hereinbefore given; that on the 3rd day of December, 1877, and within ten days from the publication of the said book as aforesaid, plaintiff deposited, or caused to be deposited in the mail at the city of St. Louis, Missouri, addressed to the Librarian of Congress, at Washington, District of Columbia, postage prepaid, two printed copies of the said book.

Plaintiff avers that in said book he published, and the same contained, in the form of foot-notes to an almanac for the year 1878, forecasts of probable weather for each and every day of the said year 1878; that said foot-notes of probable weather were original with the plaintiff in their design, composition, and general arrangement, and were the result of plaintiff's long-continued and laborious scientific research, and were by him first made known to the public; that by and on account of the premises, all of which was done strictly in accordance with the act of Congress of the United States in such case made and provided, the plaintiff became and was entitled to a copyright of the said book, and thereby the same was copyrighted, and under the provisions of the said act of Congress plaintiff thereby acquired the sole and exclusive right and liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the said book or almanac and all the same contained, and more particularly the said foot-notes to said almanac, being forecasts of probable weather for each and every day of the year 1878.

That plaintiff gave notice of such copyright by inserting in each of the several copies of said book which were by him published, on
16 the title page of each, the following, words, to wit: "Entered according to act of Congress, in the year 1877, by John H. Tice, in the office of the Librarian of Congress, at Washington. All rights reserved," in accordance with the said act of Congress in such cases made and provided.

Plaintiff further states that soon after he had secured the said copyright of said book as aforesaid, and given notice thereof as aforesaid, the defendant wrongfully and illegally commenced an infringement of the right so and thereby secured to the plaintiff, in this to wit, that in the month of December, 1877, or thereabouts, the defendant published a book called "Merrell's Almanac," meaning thereby the defendant, in which said defendant published in the form of foot-notes consisting of forecasts of probable weather for each day of the year 1878; that in the publication of said foot-notes defendant copied substantially the foot-notes of probable weather published by plaintiff in the book aforesaid, and for which plaintiff had secured a copyright as aforesaid, and plaint-

iff further avers that said defendant did, with the intent to wrong and injure the plaintiff, print and publish substantially the same foot-notes as those originated, printed, and published by said plaintiff in said book, and for which he had secured a copyright as aforesaid; that defendant, in violation of plaintiff's rights as aforesaid, and contrary to the statute in such case made and provided, and without the authority or consent of plaintiff, printed and published many hundred thousand copies of the said "Merrell's Almanac," containing said foot-notes of forecasts of probable weather for each day of the year aforesaid, and for which plaintiff had secured a copyright as aforesaid, and plaintiff avers that in consequence of the wrong and injury complained of he has sustained damages in the sum of five thousand dollars.

17 Plaintiff further avers that the matter herein complained of is one of which this honorable court has exclusive original jurisdiction. Wherefore plaintiff prays for judgment against the defendant in the sum of five thousand dollars, and for his reasonable costs.

HILL & COLLINS,
Att'ys for Pl'ff.

And afterward, on the 10th day of April, 1878, the defendant filed his answer to said amended petition, which is as follows, to wit:

Answer.

UNITED STATES OF AMERICA:

Circuit court of the United States for the eastern district of Missouri, March term, A. D. 1878.

JOHN H. TICE, PLAINTIFF,
vs.
JACOB S. MERRELL, DEFENDANT.

Now comes the defendant in the above-entitled cause, and, for answer to the amended petition therein, denies each and every allegation therein and of both counts thereof, except the allegation that the plaintiff and the defendant are citizens of the United States of America and residents of the State of Missouri and of the eastern district thereof. Wherefore he asks to be hence discharged, and that he recover his proper costs.

P. E. BLAND &
CHAS. E. DOW,
Att'ys for Def't.

And afterwards, to wit, at the September term, 1878, of said court, on the 30th day of September, the following proceedings were had in said case, to wit:

JOHN H. TICE, PLAINTIFF,
vs.
JACOB S. MERRELL, DEFENDANT.

18 Now come the parties, by their respective attorneys, the plaintiff by Messrs. Hill and Collins, and the defendant by Messrs. Bland and Dow, and this case being regularly called for trial, and both parties being ready, it is ordered that a jury come.

Jury.

And thereupon come said jury, to wit, Moses Brown, Charles H. Stevens, Alfred Minton, Fred. Rodach, W. C. French, Eli C. Lacks, Milton Craig, William R. Parkman, Samuel D. Nave, F. D. Hardesty, Charles H. Buck, and H. C. Kehr, twelve good and lawful men, duly empaneled and sworn to well and truly try the issues joined herein, and thereupon said plaintiff, by his attorneys, dismisses this cause as to the second count of his amended petition, and said jury, after hearing the evidence and arguments of counsel and receiving the charge of the court, return the following verdict, to wit:

Verdict.

We, the jury, find for the plaintiff in the sum of nineteen hundred and eighty dollars (1,980).

CHARLES H. BUCK, *Foreman.*

Judgment.

It is therefore considered by the court that the plaintiff, John H. Tice, have and recover of said defendant, Jacob S. Merrell, as well the said sum of nineteen hundred and eighty dollars, the damages aforesaid by the jury assessed, as also the costs herein expended, and have thereof execution.

And afterwards, at an adjourned day of said September term, 1878, of said court, held on the 7th day of December, the following further proceedings were had in said case, to wit:

JOHN H. TICE, PLAINTIFF,
vs.
JACOB S. MERRELL, DEFENDANT.

Now come the parties, by their attorneys, and the court having considered the motion of defendant for a new trial, orders that said motion be overruled, and thereupon, on motion, leave is granted said defendant to file his bill of exception within twenty days, nunc pro tunc, as of this date.

19 And afterwards, to wit, in vacation of said court and on the 20th day of December, 1878, the following proceedings were had in said case, to wit:

Bill of exceptions allowed.

JOHN H. TICE, PLAINTIFF,
vs.
JACOB S. MERRELL, DEFENDANT.

Now comes the defendant, by his attorneys, and presents his bill of exceptions, which is allowed, signed, and ordered to be filed as a part of the record herein, as of date December 7th, 1878.

And afterwards, in vacation of said court, on the 7th day of January, 1879, the following further proceedings were had in said case, to wit:

Writ of error allowed.

JOHN H. TICE, PLAINTIFF,
vs.
JACOB S. MERRELL, DEFENDANT.

Now comes the defendant, by his attorneys, and presents to the honorable John F. Dillon, circuit judge, a writ of error to remove this cause to the Supreme Court of the United States, and a citation, citing and admonishing the said plaintiff to be and appear at a Supreme Court of the United States, at the next term thereof, on the second Monday of October next, which said writ of error is allowed and said citation signed by said judge.

Bond app'v'd.

And the said defendant also presents his bond in the penal sum of four thousand dollars, which bond is approved and ordered to be filed, and on motion of said defendant, by his attorneys, it is ordered that a supersedeas be awarded staying further proceedings on the judgment herein.

The said bond, so approved as aforesaid, is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Jacob S. Merrell as
20 principal and Augustus Sumner as surety, are held and firmly bound unto John H. Tice in the full and just sum of four thousand dollars, to be paid to the said John H. Tice, his heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents sealed with our seals and dated this seventh day of January, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas, lately at the September term, A. D. 1878, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between John H. Tice, plaintiff, and Jacob S. Merrell, defendant, judgment was rendered against the said Jacob S. Merrell, and the said Jacob S. Merrell having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John H. Tice, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Jacob S. Merrell shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation be void; else to remain in full force and virtue.

(Signed) JACOB S. MERRELL. [SEAL.]
AUGUSTUS SUMNER. [SEAL.]

Approved by—

JOHN F. DILLON, *Judge.*

To operate as a super'deas.

JNO. F. DILLON, *Judge.*

21 And the said bill of exceptions is in words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States for the eastern district of Missouri.

JOHN H. TICE, PLAINTIFF,
vs.
JACOB S. MERRELL, DEFENDANT.

Be it remembered that on the 30th day of September, A. D. 1878, the above-entitled cause came on to be tried in the circuit court of the United States for the eastern district of Missouri, and a jury being duly empaneled and sworn to try the same, the parties thereto proceeded with the trial, and the plaintiff to maintain the issues on his part gave in evidence the plaintiff's almanac for the year 1877, containing plaintiff's forecasts of the weather for each month of the year A. D. 1877, as contained in his almanac published by him for that year, on the title page of which was printed the following words, viz:

"Professor Tice's Almanac for the year 1877, with forecasts of the weather for every day, based upon the theory that there are meteorological cycles that are fixed and determined by astronomical events. According to this theory, there are four points on the ecliptic which no planet can pass without creating electric disturbances, that affect the whole solar system. Each planet, therefore, in every revolution on its orbit, occasions four meteorological cycles. This fact, discovered by him nearly twelve years ago, has been tested and verified by him for over eleven years, and, since the announcement of it nearly two years ago, by many hundreds of others, and found to stand with surprising exactness the crucial test of facts. Entered according to act of Congress, in the year 1876, by John H. Tice, in the office of the Librarian of Congress, at Washington. All rights reserved."

22 Which said forecasts are in the words and figures following, viz:

JANUARY, 1877.

ASTRONOMICAL DISTURBING CAUSES.—On the following dates the designated planets will pass the given points on the ecliptic, namely: 1st, Vulcan 170°; 3d, Mercury 350°; 7th, Vulcan 260°; 13th, Vulcan 350°; 19, Mercury and Vulcan 80°; 24th, Vulcan 170°; and 30th, Vulcan 260°.

PROBABLE WEATHER.—1st to 4th, f.b.r.t., clouding, threatening weather, with heavy and severe rain and snow storms; 4th to 6th, r.b.l.t, clear or clearing weather, and probably very cold; 7th to 10th, f.b.r.t., clouding and threatening, with rain or snow; 10th to 12th, r.b.l.t., generally clear and cold; 12th to 16th, f.b.r.t., clouding, threatening weather, with heavy rains and snows; 16th to 18th, r.b.f.t., clear and cold; 18th to 21st, f.b.r.t., clouding and threatening weather, with rain and snow; 21st to 23d, r.b.f.t., clear and cold; 23d to 26th, f.b.r.t., clouding and threatening, with heavy rain or snow storms; 27th to 29th, r.b.f.t., clear or clearing and cold; 29th to 31st, f.b.r.t, clouding and threatening, with rain or snow. The periods of comparatively warm weather are about 2d, 7th, 14th, 19th, and 25th. The periods of comparatively cold weather will be about 4th, 10th, 16th, 21st, and 27th; some probably will be very cold.

FEBRUARY, 1877.

ASTRONOMICAL DISTURBING CAUSES.—During this month, on the days specified, the following astronomical events will occur, namely: Venus at 260°, Vulcan at 350°, and Mercury at 170° on 5th; Vulcan at 80° on 11th, at 170° on 16th, and 260° on 22d, and at 350° on 28th.

PROBABLE WEATHER.—1st to 3d, r.b.f.t, clear and cold; 4th to 8th, f.b.r.t., cloudy and threatening, with very severe rain and snow storms in places; 8th to 10th, r.b.f.t., clear and very cold if the disturbance winds up with a high barometer from the northwest; 10th to 13th, f.b.r.t., clouding and threatening, with local rains and snows; 13th to 15th, r.b.f.t., clear and cold; 15th to 18th, f.b.r.t., clouding and threatening, with heavy storms in places; 18th to 20th, r.b.f.t., clear and cold; 21st to 23d, f.b.r.t., clouding and threatening, with rain and snow; 23d to 26th, r.b.f.t., clear and pleasant; 26th to 28th, f.b.r.t, clouding and threatening, with heavy storms imminent. Probably a severe "Norther" will be felt in Texas about 7th. Representing the temperature of the month by a wave the highest points will occur about 6th, 12th, 17th, 22d, and 28th; the lowest points will be about 2d, 8th, 13th, and 25th.

MARCH, 1877.

The astronomical disturbing causes during the month are as follows: 5th, Mercury's passage of 260°; 6th, Vulcan's passage of 80°; 11th, earth's passage of 170°; 11th, Vulcan's passage of 170°; 17th, Vulcan's passage of 260°; 23d, Vulcan's passage of 350°; 29th, Vulcan's passage of 80°.

PROBABLE WEATHER.—1st and 2d, f.b.r.t., clouding and threatening, with heavy rains and storms in places; 3d to 4th, r.b.f.t., clear or fair; 5th to 7th, f.b.r.t., clouding and threatening, with rain; 8th to 10th, r.b.f.t., clear or fair; 10th to 14th, f.b.r.t., clouding and threatening, with heavy rains and very severe storms in places; 14th to 16th, r.b.f.t., clear or fair; 16th to 19th, f.b.r.t., clouding and threatening, with rain storms; 19th to 22d, r.b.f.t., clear or fair; 22d to 25th, f.b.r.t., clouding and threatening, with heavy rains and severe storms in places; 26th to 28th, r.b.f.t., clear or fair; 29th to 31st, f.b.r.t., clouding and threatening, with rain. The warmer periods will be about 1st, 7th, 13th, 18th, 24th, and 30th. The cooler periods will be about 3d, 8th, 15th, 20th, and 26th.

APRIL, 1877.

The astronomical disturbing causes for this month will be as follows: 1st, Mercury's passage through 350°; 2d, Venus' passage through 350°; 3d, Vulcan's passage through 170°; 9th, Vulcan's passage through 260°; 15th, Vulcan's passage through 350°; 17th, Mercury's passage through 80°; 21st, Vulcan's passage through 80°; 26th, Vulcan's passage through 170°.

PROBABLE WEATHER.—1st to 5th, variable, generally low barometer, higher temperature, clouding and very threatening weather, rainy, with severe storms in places; 5th to 8th, r.b.f.t., clear or fair; 8th to 11th, f.b.r.t., clouding and threatening, with rain in places; 11th to 14th, r.b.f.t., clear or fair; 14th to 18th, f.b.r.t., clouding and threatening, with heavy rains and severe storms in places; 18th to 20th, r.b.f.t., clear or fair; 20th to 23d, f.b.r.t., clouding and threatening, with local

rains; 23d to 25th, r.b.f.t., clear or fair; 25th to 29th, f.b.r.t., clouding and threatening, with heavy storms in places; 29th to 30th, r.b.f.t., clear or fair. The warmer days will be about April 3d, 10th, 16th, 22d, and 27th. The colder periods will occur about 5th, 11th, 18th, and 23d; at nearly, if not quite all, frosts may be expected.

MAY, 1877.

The astronomical disturbing causes during the month are: 2d, Vulcan's passage through 260°; 4th, Mercury's passage through 170°; 8th, Vulcan's passage through 350°; 14th, Vulcan's passage through 80°; 19th, Vulcan's passage through 170°; 25th, Vulcan's passage through 260°; Venus' passage through 80°; 31st, Vulcan's passage through 350°.

PROBABLE WEATHER.—1st, fair; 3d to 5th, f.b.r.t., clouding, threatening weather, with heavy storms in places; 5th to 7th, r.b.f.t., clear or fair; 7th to 10th, f.b.r.t., clouding, threatening weather, with severe storms in places; 10 to 12th, r.b.f.t, fair or clear, with liability to frost, especially in northern sections; 13th to 15th, f.b.r.t., clouding and threatening weather, with local rains; 16th to 17th, r.b.f.t., clear or fair; 18th to 20th, f.b.r.t., clouding and threatening weather, with severe storms in places; 21st to 24th, r.b.f.t., clear or fair; 25th to 31st, variable, generally f.b.r.t., showery and threatening weather, with severe storms about 30th and 31st. The warmest days will be about 5th, 9th, 14th, 20th, 26th, and 31st. The cooler days will be about 1st, 6th, 11th, 16th, and 22d.

23 JUNE, 1877.

The disturbing astronomical events during this month are: 1st, Mercury's passage through 260°; 6th, Vulcan's passage through 80°; 11th, Earth's passage through 260°, and Vulcan's passage through 170°; 17th, Vulcan's passage through 260°; 23d, Vulcan's passage through 350°; 28th, Mercury's passage through 350°; 29th, Vulcan's passage through 80°.

PROBABLE WEATHER.—1st and 2d, showery and perhaps heavy storms; 3d to 5th, r.b.f.t., generally clear or fair; 5th to 8th, f.b.r.t., clouding and threatening, with local rains; 8th to 10th, r.b.f.t., generally clear; 10th to 15th, f.b.r.t., clouding, threatening weather, with very heavy rains and severe storms in places; 15th to 16th, r.b.f.t., generally clear; 16th to 20th, f.b.r.t., clouding and threatening, with local storms; 21st to 22d, r.b.f.t., generally fair; 22d to 25th, f.b.r.t., clouding and threatening, with heavy rains and severe storms in places; 26th to 27th, r.b.f.t., generally clear or fair; 27th to 30th, f.b.r.t., clouding and threatening, with heavy local rain storms. The warmest weather will be about 2d, 7th, 12th, 18th, 24th, and 29th. The coolest weather will be about 4th, 8th, 15th, and 20th.

JULY, 1877.

The disturbing astronomical events during the month are: 4th, Vulcan's passage of 170°; 10th, Vulcan's passage of 260°; 14th, Mercury's passage of 80°; 16th, Vulcan's passage of 350°; 22d, Vulcan's passage of 80°; 23d, Venus' passage of 170°; 27th, Vulcan's passage of 170°.

PROBABLE WEATHER.—1st and 2d, generally clear and pleasant; 3d to 7th, f.b.r.t., clouding and threatening, with heavy rains and se-

vere storms in places; 7th to 9th, generally fair and pleasant; 10th to 13th, f.b.r.t., clouding and threatening, with local rains; 13th to 15th, generally fair, but some local rains; 15th to 18th, f.b.r.t., clouding and threatening with heavy rains and severe storms in places; 18th to 21st, r.b.f.t., generally clear or fair; 21st to 25th, f.b.r.t., clouding and threatening, with heavy rains; 25th to 26th, r.b.f.t., generally clear; 26th to 29th, f.b.r.t., clouding, threatening weather, with rain and wind storms in places; 29th to 31st, r.b.f.t., generally fair or clear. The warm periods are about 5th, 11th, 14th, 17th, 23d, and 28th. The cooler periods are about 1st, 8th, 19th, and 30th.

AUGUST, 1877.

Disturbing astronomical events will occur during this month as follows: 1st, Mercury's passage at 170°; 2d, Vulcan's passage at 260°; 8th, Vulcan's passage at 350°; 14th, Vulcan's passage at 80°; 19th, Vulcan's passage at 170°; 25th, Vulcan's passage at 260°; 27th, Mercury's passage at 260°; 31st, Vulcan's passage at 350°.

PROBABLE WEATHER.—1st to 3d, f.b.r.t., clouding and threatening weather, with heavy rains and storms in places; 4th to 7th. r.b.f.t., clear or fair; 7th to 10th, f.b.r.t., clouding and threatening, with severe storms in places; 11th to 13th, r.b.f.t., clear or fair; 14th to 16th, f.b.r.t., clouding, threatening weather, with local rains; 17th to 18th, r.b.f.t., clear; 18th to 21st, f.b.r.t., clouding, threatening weather, with heavy storms in places; 21st to 24th, r.b.f.t., clear, with liability of frost north of the 40th parallel of latitude; 25th to 28th, variable, generally clouding and threatening, with rains in places; 28th to 30th, r.b.f.t., generally clear; 30th to 31st, f.b.r.t., clouding and very threatening, with, probably, heavy storms about 31st. The warmest days will be about 2d, 9th, 15th, 20th, 26th, and 30th. The cooler days will be about 4th, 11th, 16th, and 22d.

SEPTEMBER, 1877.

Disturbing astronomical events will take place: On September 6th, Vulcan's passage at 80°; 11th, Earth's passage at 350°, and Vulcan's passage at 170°; 17th, Venus' passage at 260°, and Vulcan's passage at 260°; 23d, Mercury's passage at 350°; 23d, Vulcan's passage at 350°; 29th, Vulcan's passage at 80°.

PROBABLE WEATHER.—1st and 2d, threatening and heavy storms; 3d to 5th, r.b.f.t., generally fair; 5th to 8th, f.b.r.t., clouding and threatening, with rain in places; 8th to 10th, r.b.f.t., generally fair; 10th to 14th, f.b.r.t., clouding and threatening, with very heavy rains and severe storms in places; 14th to 16th, r.b.f.t., generally fair; 17th to 19th, f.b.r.t., clouding and threatening, with very heavy rains and perhaps severe storms in places; 20th to 22d, r.b.f.t., generally fair; 22d to 25th, f.b.r.t., clouding and threatening, with very heavy rains and severe storms in places; 25th to 28th, r.b.f.t., clear and cool; 29th to 30th, clouding and threatening, with local rains. The warmer periods will be about 1st, 12th, 18th, 24th, and 30th. Cooler periods will occur about 4th, 9th, 15th, and 25th. Possibly a tropical cyclone may appear on the South Atlantic or Gulf coast, either about 11th, 17th, or 23d; in that case, cool weather will prevail over the West and North until the cyclone has passed off.

OCTOBER, 1877.

Disturbing astronomical events will take place: On Oct. 4th, Vulcan's passage at 170°; 9th, Mercury's passage at 80°; 10th, Vulcan's passage at 260°; 16th, Vulcan's passage at 350°; 22d, Vulcan's passage at 80°; 26th, Mercury's passage at 170°; 27th, Vulcan's passage at 170°.

PROBABLE WEATHER.—1st to 3d, r.b.f.t., clear or fair; 3d to 7th, f.b.r.t., clouding and threatening, with severe storms in places; 7th, 8th, r.b.f.t., clear or fair; 9th to 12th, f.b.r.t., clouding and threatening, with local storms; 12th to 14th, r.b.f.t., clear; 15th to 18th, f.b.r.t., clouding and threatening, with rain and severe gales in places; 18th to 21st, r.b.f.t., clear and cold; 21st to 24th, f.b.r.t., cloudy, with rain storms in places; 24th, 25th, r.b.f.t., clear; 25th to 29th, f.b.r.t., variable, generally clouding and threatening, with heavy rains and severe gales in places; 30th, 31st, r.b.f.t., clear and cold. The warmer periods will be about 5th, 10th, 17th, 22d, and 27th. The cooler periods will be about 1st, 7th, 12th, 19th, 24th, and 30th. Probably "Northers" will occur in Texas about 14th and 29th.

24 NOVEMBER, 1877.

Disturbing astronomical events will happen: On November 2d, Vulcan's passage at 260°; 8th, Vulcan's passage at 350°; 12th, Venus' passage at 350°; 14th, Vulcan's passage at 80°; 19th, Vulcan's passage at 170°; 23d, Mercury's passage at 260°; 25th, Vulcan's passage at 260°.

PROBABLE WEATHER.—1st to 4th, f.b.r.t., clouding and threatening, with local rains; 4th to 6th, r.b.f.t., clear and cool; 7th to 15th, f.b.r.t., variable, generally clouding and threatening, with heavy rain storms in places, and severe gales on lakes and Atlantic coast; 15th to 18th, r.b.f.t., clear and cold, with probably a "Norther" in Texas; 19th to 23d, f.b.r.t., clouding and threatening, with heavy rains and severe storms in places; 24th to 25th, r.b.f.t., clear and cool; 25th to 27th, f.b.r.t., clouding and threatening, with rain storms; 28th to 30th, r.b.f.t., clear and cold. The warmer periods will be about 3d, 9th, 12th, 16th, 20th, and 26th. The colder periods will be about 6th, 15th, 21st, and 29th.

DECEMBER, 1877.

Disturbing astronomical events will take place: On December 1st, Vulcan's passage at 350°; 7th, Vulcan's passage at 80°; 12th, Earth's passage at 80°; 12th, Vulcan's passage at 170°; 18th, Vulcan's passage at 260°; 19th, Mercury's passage at 350°; 24th, Vulcan's passage at 350°; 30th, Vulcan's passage at 80°.

PROBABLE WEATHER.—1st to 3d, f.b.r.t., clouding and threatening, with severe rain or snow storms; 4th to 6th, r.b.f.t., clear and cold; 7th to 9th, f.b.r.t., clouding and threatening, with rain or snow storms in places; 9th to 10th, r.b.f.t., clear or fair and cold; 11th to 14th, variable, generally f.b.r.t., clouding and threatening, with heavy rain and snow-falls in places, accompanied by severe gales; 15th to 17th, r.b.f.t., clear and cold; 18th to 20th, f.b.r.t., clouding and threatening, with rain or snow; 21st to 23d, r.b.f.t., clear or fair and cold; 23d to 25th, f.b.r.t., clouding and threatening, with heavy rain or snow storms and high winds; 26th to 29th, r.b.f.t., clear and cold; 30th to 31st, clouding and threatening, with rain or snow. The warmer periods will be about

2d, 8th, 12th, 19th, 25th, and 31st. The colder periods will be about 5th, 10th, 15th, 20th, and 26th.

And further to maintain the issues on his part the plaintiff read in evidence defendant's almanac for the year 1877, containing the forecasts of the weather for each month of said year contained in the defendant's almanac by him published for that year, which forecasts are as follows, viz:

JANUARY, 1877.

PROBABLE WEATHER.—1 to 2 threatening weather, 3 to 5 variable, clear, 15 to 18 severe northers in places, 19 to 24 pleasant, 25 to 28 6 and 7 severe cold but generally clear, 8 to 11 more pleasant, 12 to 14 mild, 29 to 30 clear, 31 threatening rain.

FEBRUARY, 1877.

PROBABLE WEATHER.—1 to 3 warmer, heavy rains in places, 4 to 7 warmer, 8 to 11 colder, 12 to 18 cloudy, threatening rain, 20 to 23 changeable, 24 to 26 threatening rain in places, 27 and 28 generally clear and pleasant.

MARCH, 1877.

PROBABLE WEATHER.—1 to 5 rain and snow, 6 to 7 fair, 8 to 10 stormy, 13 to 15 local storms, 16 to 19 variable, 20 to 25 mild with some rain, 26 to 29 clouding and some heavy rains, 30 to 31 clear.

APRIL, 1877.

PROBABLE WEATHER.—1 to 5 fair, 6 to 8 variable, with heavy storms in places, 8 to 10 pleasant, 11 to 13 threatening generally and some heavy storms, 13 to 15 fair, 16 local rains, 17 to 21 cooler, 22 to 23 stormy, 24 to 27 generally fair, 27 to 29 threatening, with heavy storms in places, 30 fair.

25 MAY, 1877.

PROBABLE WEATHER.—1 to 3 fair, 4 to 6 threatening, 7 clear, 8 to 10 cloudy, 10 to 12 fair and clear, 13 to 15 threatening with rain, 16 to 18 fair, 18 to 20 cloudy with severe storms in places, 21 to 24 clear or fair, 25 to 31 variable.

JUNE, 1877.

PROBABLE WEATHER.—1 to 3 showery, 4 to 5 clear and fair, 6 to 8 cloudy with local rains, 9 to 10 fair, 11 to 15 rains, severe storms, 16 to 20 clear, 22 to 25 cloudy and threatening, 26 and 27 fair, 28 to 30 cloudy with rain.

JULY, 1877.

PROBABLE WEATHER.—1 to 4 pleasant, 5 to 8 cloudy, 8 to 9 fair, 10 to 13 threatening with local rains, 14 to 15 clear, 16 to 18 cloudy, 19 to 22 clear, 23 to 25 heavy rains, 26 to 27 threatening with wind storms in places, 30 to 31 generally fair and clear.

AUGUST, 1877.

PROBABLE WEATHER.—1 to 3 cloudy, heavy rains in places, 4 to 7 fair, 8 to 10 threatening, 11 to 13 clear, 14 to 16 cloudy, 17 to 18 mild, 19 to 21 threatening with storms, 22 to 24 clear with frost, 25 to 28 changeable, 29 31 cloudy with threatening storms.

SEPTEMBER, 1877.

PROBABLE WEATHER.—1 to 5 stormy, 6 to 8 cloudy, 9 to 10 clear, 10 to 14 heavy rain storms, 15 to 16 pleasant, 17 to 19 threatening, 20 to 22 mild, 23 to 25 cloudy, 26 to 28 clear and cool, 29 to 30 cloudy with rain.

OCTOBER, 1877.

PROBABLE WEATHER.—1 to 3 fair, 4 to 7 cloudy, 8 to 10 clear, 11 to 12 stormy, 13 to 14 clear, 15 to 18 cloudy, 19 to 21 clear and cold, 22 to 24 rain storms, 25 to 29 variable, generally cloudy, 30 to 31 clear and cold.

NOVEMBER, 1877.

PROBABLE WEATHER.—1 to 4 cloudy, 5 to 7 clear and cold, 7 to 9 threatening, 10 to 14 variable, generally cloudy, 15 to 23 clear and cold, 24 to 25 cloudy with rain or snow storms, 26 high wind, 27 to 31 clear and cold.

DECEMBER, 1877.

PROBABLE WEATHER.—1 to 3 cloudy with rains, 5 to 7 clear and cool, 8 to 15 changeable, generally cloudy, 16 to 18 clear and cold, 19 to 23 threatening with heavy rains in places, 24 to 25 cool, 26 to 28 cloudy, 29 to 30 clear.

And further to maintain the issues on his part plaintiff offered in evidence the following paper, to wit:

26 LIBRARY OF CONGRESS, COPYRIGHT OFFICE, UNITED STATES OF AMERICA.

LIBRARY OF CONGRESS,
Copyright Office, Washington.

No. 12579 G.

To wit: Be it remembered that on the 13th day of November, anno Domini 1876, John H. Tice, of St. Louis, Mo., has deposited in this office the title of a book, the title or description of which is in the following words, to wit:

Professor Dice's Almanac for the year 1877,

With forecasts of the weather for every day, based upon the theory that there are meteorological cycles that are fixed and determined by astronomical events. According to this theory, there are four points on the ecliptic which no planet can pass without creating electric disturb-

ances, that effect the whole solar system. Each planet, therefore, in every revolution on its orbit, occasions four meteorological cycles.

St. Louis, Mo.

The right whereof he claims as proprietor in conformity with the laws of the United States respecting copyrights.

LIBRARIAN OF CONGRESS, COPYRIGHT OFFICE, UNITED STATES OF AMERICA.

(Signed) A. R. SPOFFORD,
Librarian of Congress.

I, A. R. Spofford, Librarian of Congress, hereby certify that the foregoing is a true copy of the original record of copyright in the Library of Congress.

In witness whereof I have hereunto set my hand and affixed the seal of my office this 11th day of May, 1878.

A. R. SPOFFORD,
Librarian of Congress.

Two copies of the above publication deposited December 6, 1876.

27 To the introduction of the portion of said paper in the following words, viz, "two copies of the above publication deposited December 6th, 1876," the defendant then and there duly objected, on the ground that the same was no part of the certificate of the Librarian of Congress to which the same is appended at the bottom thereof, and that it is a mere anonymous statement, when and by whom made does not appear, and is incompetent; which objection the court overruled, and permitted said statement to go to the jury, to which action of the court the defendant then and there duly excepted.

And further to maintain the issues on his part the plaintiff introduced as a witness Frank J. Brunold, who, being duly sworn, gave in evidence testimony tending to prove that the forecasts of the weather contained in defendant's almanac for the year 1877 were by him copied from those of the plaintiff's almanac for that year at the express instance and direction of the defendant, with merely colorable alterations.

And further to maintain the issues on his part the plaintiff put in evidence tending to prove that the defendant published for the year 1877 about 90,000 copies of his almanac containing the said forecasts of the weather for that year, and that of the number of almanacs published by defendant for that year, defendant sent out to his customers for circulation about 45,000 copies of said almanac which were distributed. And also evidence tending to show that the plaintiff's profits upon the sale of 45,000 copies of his almanac for 1877, if such sale had been made at the rate at which he was selling his almanacs, would have been more than nineteen hundred and eighty dollars; and also that the whole edition of the plaintiff's almanac, containing his forecasts of the weather for the year 1877, amounted in number to 15,000; also that the whole of such edition was sold by him before the 1st of May, 1877,
28 except 500 copies (thereof), and that his said edition was not stereotyped, and that plaintiff's net profit on his sale of said edition of 15,000 was $800. And also evidence tending to show that in April, 1877, people claimed that defendant's almanac for 1877 con-

tained the same forecasts of the weather as the plaintiff's almanac for that year under his copyright, in about a dozen instances, and for that reason declined to purchase plaintiff's said almanac; also that plaintiff commenced the sales of his said almanac about December 1st, 1876, and sold all but about four or five hundred by April, 1877, and all were sold by the middle of June ensuing.

The above and foregoing was all the evidence introduced by the plaintiff on the trial of the said cause, and here the plaintiff rested.

The defendant, to maintain the issues on his part, put in evidence before the jury tending to impeach said witness Frank J. Brunold, and to contradict him; and also to prove the defendant's almanac containing said forecasts were gratuitously distributed by defendant as advertisements of his wholesale drug and medicine business, and that he never sold any of said almanacs, and that his said almanac was published after the 1st of May, in the year 1877.

The defendant offered to read in evidence the forecasts of the weather for the year 1877 contained in J. H. McLean's almanac for that year, in relation to which prior evidence had been given tending to show it to be a pirated edition of plaintiff's forecasts, and compromised between plaintiff and McLean; and in connection therewith he offered evidence to prove that said McLean's almanac was published long before the alleged time of the publication of defendant's said almanac, and that
29 3,000,000 copies of said almanac of McLean were published and distributed for the said year, and that the forecasts contained in said McLean's almanac for said year 1877 were substantially the same as those of the plaintiff's almanac for the same year; which said offer the court overruled and excluded the evidence so offered to be given, to which ruling of the court the defendant then and there duly excepted.

The defendant also gave in evidence tending to prove that the plaintiff made forecasts for defendant for his almanac for the year 1876 for $75, and offered to make the forecasts for the year 1877 for the defendant for the sum of $250, which offer defendant refused.

The defendant was a witness in his own behalf, on this trial, as to the number of almanacs distributed by him, and generally.

The defendant also called as a witness William P. Doran, one of his former employees.

And the above and foregoing was all the evidence given or offered to be given by the defendant on the trial of said cause, and here both the plaintiff and defendant rested.

Charge.

The cause was then argued before the jury by counsel for the respective parties, after which the court charged the jury that, if they were satisfied from the evidence that the plaintiff had complied with the requirements of the law touching the acts to be performed by him, that is, before the publication of his almanac for 1877 he had delivered at the office of the Librarian of Congress, or deposited in the mail addressed to said librarian, at Washington, District of Columbia, a copy of the title of said almanac; and that he had also, within ten days after the publication thereof, delivered at the office of said librarian, or deposited in the mail addressed to said librarian, at the said city of Washington, two copies of said almanac; and if they were further satisfied from the evidence that the defendant had in his almanac for the year 1877 copied the forecasts of the weather contained in the plaintiff's

30 said almanac, then they should find for the plaintiff, and that a literal and exact copy was not necessary to constitute an infringement; that a substantial copying with colorable changes only was sufficient to constitute an infringement; and, further, that if they found for the plaintiff, they might presume in the absence of countervailing testimony that plaintiff would have sold as many copies of his almanac as defendant had distributed copies of the pirated work, or that prima facie the number of almanacs distributed by defendant was the number plaintiff would have sold had the defendant not pirated plaintiff's work, and that, accordingly, in assessing plaintiff's damages, the jury should assess against the defendant the total amount of net profits which they believe from the evidence plaintiff would have realized from the sales of as many of plaintiff's almanacs as was the number of defendant's almanacs distributed, unless countervailing testimony had shown the damages or net profits to be less.

The cause was then submitted to the jury, upon the evidence and charge of the court, and thereupon the jury returned a verdict for the plaintiff against the defendant, in the sum of one thousand nine hundred and eighty dollars, and thereupon the court gave judgment against the defendant in favor of the plaintiff for that sum of money and the costs of suit.

And thereupon, and within four days thereafter, and in due time, the defendant filed his motion in the said cause to set aside the verdict and judgment therein, and for a new trial thereof, which motion is as follows, viz:

Motion for a new trial.

In the circuit court of the United States for the eastern district of Missouri, March term, 1878.

31 JOHN H. TICE, PLAINTIFF,
vs.
JACOB S. MERRELL, DEFENDANT.

Now comes the defendant in the above-entitled cause and moves the court to set aside the verdict and judgment therein for the following reasons, viz:

1st. Because the verdict was unsupported by any evidence given in said trial of said cause, in this, that no evidence was given to the jury showing or tending to show that the plaintiff, before the publication of his almanac for the year 1877, did deliver at the office of the Librarian of Congress, or did deposit in the mail, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of said almanac; nor any evidence tending to show that the plaintiff did, within ten days from the publication of said almanac, deliver at the office of the Librarian of Congress, or did deposit in the mail, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright almanac.

2nd. Because the verdict was against the law and against the instructions of the court.

3rd. Because the verdict was against the evidence and the weight of evidence.

4th. Because the verdict was against the law and the evidence.

5th. Because the damages found for the defendant are excessive and not supported by the evidence.

6th. Because the court admitted illegal and improper evidence offered by the plaintiff.

7th. Because the court erred in excluding legal and proper evidence offered by the defendant.

8th. Because the court erred in charging the jury that if they found for the plaintiff they should assess his damages in such an amount
32 as would equal the aggregate profits which the plaintiff would have realized on the sale of a like number of almanacs of his publication for the year 1877 as the number of almanacs published and sent out for distribution by the defendant for the said year.

9th. Because since the trial of the said cause the defendant has discovered new and material evidence, of which he was entirely ignorant until after said trial, and which he will on another trial to produce, and which, if produced on said trial, would have materially changed the verdict, which is unjust to the defendant; which said newly discovered evidence fully appears by the affidavits of defendant and others filed herewith in support of this motion.

CHARLES E. DOW,
PETER E. BLAND, &
M. L. GREY,
Defendant's Attornies.

Which said motion, after hearing the arguments of counsel thereon, was on the 7th day of December, 1878, overruled by the court, to which ruling of the court the defendant then and there duly excepted. And thereupon the defendant prayed the court for an extension of time, to wit, twenty days thereafter, within which to file his bill of exceptions, which prayer the court granted. And now comes the defendant within the said twenty days *comes* and tenders this his bill of exceptions, and asks the court to allow and sign the same, and that the same may be signed and sealed and made part of the record, which is done accordingly.

SAMUEL TREAT, [SEAL.]
Judge.

33 The following opinion was filed by the honorable Samuel Treat, judge, who presided at the trial of this cause:

Opinion.

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vs. } Motion for new trial.
MERRELL.

As to the first point concerning newly discovered evidence, no diligence is shown. The defendant was himself a witness, and stated what number of copies he distributed. As that number might determine, together with other facts, what should be the measure of damages, if any, he should have been prepared with his whole evidence. But independent of that inquiry, there are other important considerations, viz, that the evidence shows he designedly pirated the plaintiff's copyright, not of the whole work, but of its most essential elements, through which value would exist.

Plaintiff had made his forecasts for defendant for the previous year, at the price of fifty dollars, or thereabouts, whereby a certain advantage was to accrue to defendant on the supposed intellectual attainments and

reputation of plaintiff; whether by way of advertising, or otherwise, is immaterial. When defendant proposed an issue of almanacs for 1877, he sought the aid of plaintiff for forecasts, but the plaintiff refused to perform the intellectual labor required for a sum less than $200 or $250, which was refused. Thereupon the plaintiff issued his copyright almanac, which defendant pirated, not by accident, but by express design.

It is said that the court erred in admitting the certificate of the Librarian of Congress, whereupon was noted that copies of the work were filed within the time prescribed, because said statement did not appear above the signature and seal. About that I have had serious doubts, but inasmuch as a technical objection depends solely on
34 the technical mode of certification, and as the seal and signature prescribed are present, I know not why the ordinary rules as to alterations, if any, should not obtain.

Hence there was no error in admitting that certificate.

Next, it is contended that the court ought to have admitted evidence pertaining to the McLean publications. As to those publications, that McLean and Tice (the plaintiff) had a compromise, wherein Tice's rights were admitted, and that was subsequent to the McLean publications. How this defendant could justify by copying an admitted piracy is not ascertainable. But it is said that the circulation of the McLean publications, which, even if pirated, flooded the market, did not enable the defendant to damage the plaintiff to the extent found by the jury, and that defendant's gratuitous publications were not the cause of all the damage plaintiff sustained. Possibly the rule as to tort feasors might apply, but the court does not base its opinion on that rule alone.

It is said that the true rule for a recovery is as to damages actually sustained, which the court accepts.

How shall those damages be ascertained? The court is referred to the views expressed in patent cases, on both the law and equity sides of the court.

To analyze those rules, and the statutory and other reasons on which they rest, would require more time than is at the present command of the court.

It is recognized as a sound rule of law that the plaintiff can recover only for the actual damages he has sustained; and it is contended that he must show that he lost a sale of his book in each instance, and what the loss of each amounted to. In other words, it must be proved
35 that each person to whom defendant issued his almanac would have bought plaintiff's, before any element of damage can be sustained as to that pamphlet. As suggested at the hearing, if such were the rule a copyright is valueless.

In this case, for illustration, where only a few cents on each copy would be the actual profit of plaintiff, if he were required to have as a witness each man who received a pirated copy and prove that if he had not received the pirated copy he would have bought the plaintiff's publication, his copyright would have been practically worthless. At the trial the piracy was proved. The court in instructing the jury as to the measure of damages directed attention to the number of the pirated edition issued by defendant, as also as to the profits the plaintiff made on his copyright, and stated that it might be presumed, in the absence of countervailing testimony, that the plaintiff was damaged to the extent of plaintiff's loss of profits on the defendant's pirated issue.

This motion rests on several grounds:

1st. Newly discovered evidence, as to which the defendant brings himself within no recognized principle, as to diligence.

2d. Refusal to permit an inquiry as to McLean's almanacs which were irrelevant to the inquiry for the reason stated. 3 Otto, 64.

3rd. Error in instructions as to measure of damages, in which no error is ascertained applicable to the facts of this case. It must be borne in mind, that when under the evidence the defendant is not an accidental but a designed infringer, he does not occupy a position for other than the fullest measure of damages.

36 4th. The technical objection as to certificate, wherein the statement of forwarding copies to Librarian is not above the signature or seal, or below. On that, comment has been made.

If the jury had disregarded all the evidence except that of defendant himself, it would have been justified in assessing the damages at more than twice the sum found. If the court committed error as to the admission of evidence, even though on the narrowest technical grounds, it would be compelled to correct the same, and grant a new trial—but no such error appears. So as to instructions on the measure of damages. In the light of all the facts and circumstances developed at the trial, the court detects no error or injustice. Motion for new trial overruled.

37 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss :

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached to be a true copy of the record and proceedings had, together with the writ of error and citation, in case No. 1178 of John H. Tice, plaintiff, against Jacob S. Merrell, defendant, as fully as the same remain on file and of record in said case in my office.

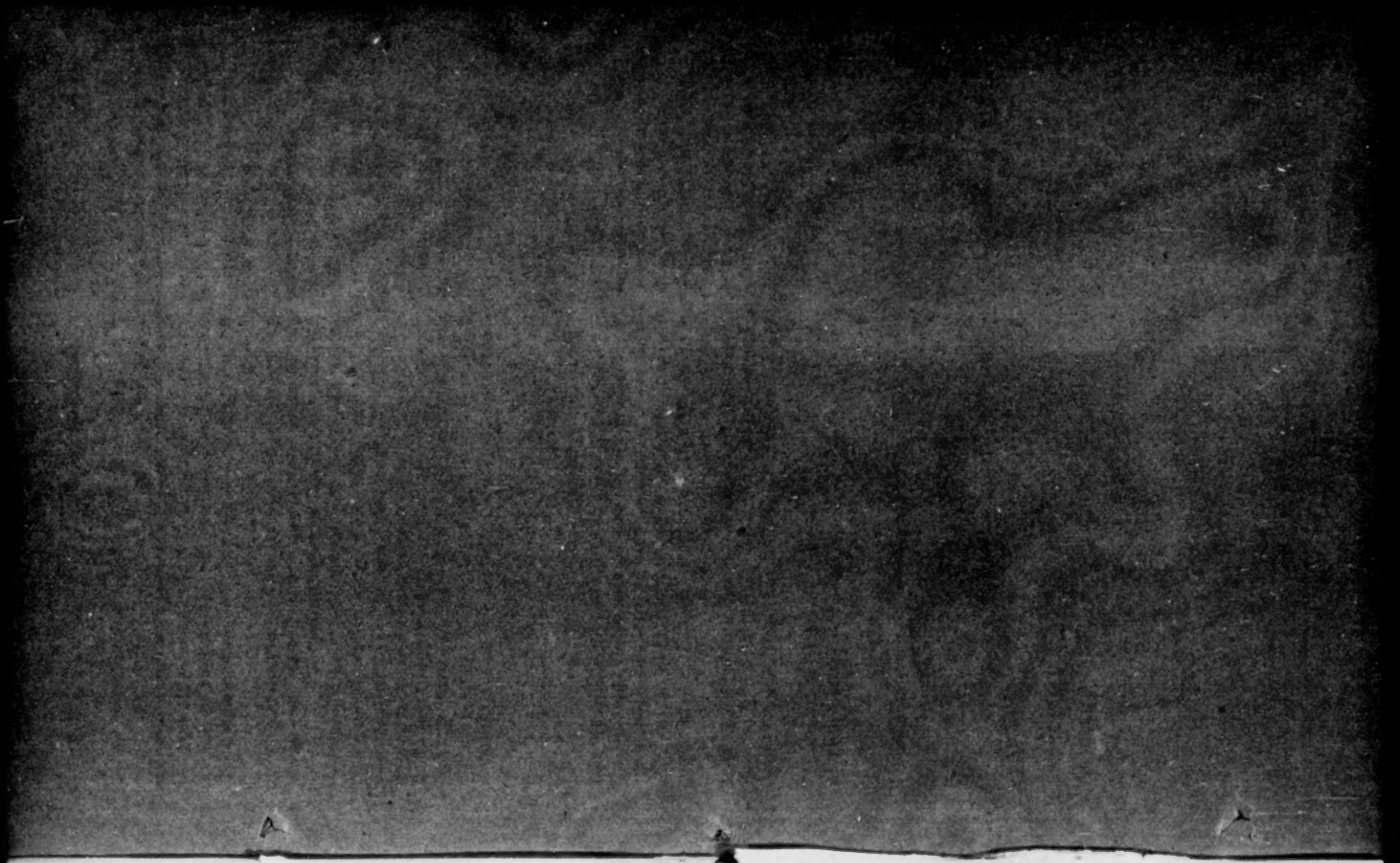
In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 28th day of January, in the year of our Lord eighteen hundred and seventy-nine.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *Deputy.*

(Indorsed :) No. 1178. United States circuit court, eastern district of Missouri. John H. Tice against Jacob S. Merrell. Duly certified copy of the record and proceedings had in the above-entitled cause.

(Indorsement on cover :) No. 198. Jacob S. Merrell, plaintiff in error, vs. John H. Tice. Filed 14th June, 1879. E. Missouri C. C. U. S.



SUPREME COURT U.S.
FILED
DEC 10 1881

No. 198.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

JACOB S. MERRELL, PLAINTIFF IN ERROR,

vs.

JOHN H. TICE, RESPONDENT.

WRIT OF ERROR FROM U. S. CIRCUIT COURT FOR EASTERN DISTRICT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR

BY

M. L. GRAY, ATTORNEY FOR PLAINTIFF IN ERROR.

IN THE UNITED STATES SUPREME COURT.

OCTOBER TERM, 1881.

JACOB S. MERRELL, PLAINTIFF IN ERROR, DEFENDANT BELOW,

vs.

JOHN H. TICE, RESPONDENT, AND PLAINTIFF BELOW.

IN ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT.

This was an action at law, brought by Tice against Merrell, to recover damages for the alleged infringement of copyright claimed by plaintiff below, and was tried on the first count of an amended petition, which alleged substantially that plaintiff below, on 13th November, 1876, delivered at the office of the Librarian of Congress, in Washington, D. C., a printed copy of the title of his Almanac, containing forecasts of the weather for every day in the year 1877; that on 29th November, 1876, he published his Almanac, and that on 2d December, 1876, and within ten days from the publication thereof, he deposited "in the mail at the city of St. Louis, Missouri, addressed to the Librarian of Congress, at Washington, District of Columbia, postage prepaid, two printed copies of the said book."

Respondent Tice averred that in said book he published in footnotes for the year 1877, forecasts of the probable weather for each day of said year, and that, by compliance with the act of Congress, he was entitled to a copyright of said book, and gave notice thereof, as required by act of Congress, and averred that J. S. Merrell, defendant below, thereafter, in December, 1876, published a book called "Merrell's Almanac," and substantially copied plaintiff's forecasts of the weather, secured by copyright, and thereby violated respondent's rights to his damage 5,000 dollars.

The answer of Merrell was a denial of each and every allegation of the petition, except of the citizenship of the parties.

On a trial before a jury, respondent, Tice, gave in evidence his almanac containing his forecasts of the weather for each month of the year 1877, as contained in his Almanac. (Top pages of printed record from 12 to 17.)

Also, he gave in evidence the forecasts of the weather for each month of 1877, as contained in "Merrell's Almanac," (pp. 17 and 18 of printed record.)

Further, respondent Tice gave in evidence the following:

"Library of Congress,
Copyright office,
United States of America.

"Library of Congress,
Copyright office,
Washington.

"No. 12,579, G.,

"to-wit: Be it remembered that on the 13th day of November, Anno Domini, 1876, John H. Tice, of St. Louis, Mo., has deposited in this office the title of a book, the title or description of which is in the following words, to-wit:

"Professor Dice's (Tice's) Almanac for the year 1877, with forecasts of the weather for every day, based upon the theory that there are meteorological cycles that are fixed and determined by astronomical events. According to this theory there are four points on the ecliptic, which no planet can pass without creating electric disturbances that effect the whole polar system. Each planet, therefore, in every revolution on its orbit, occasions four meteorological cycles.

St. Louis, Mo.

"The right whereof he claims as proprietor, in conformity with the laws of the United States respecting copyrights.

(Signed) "A. R. SPOFFORD,
Librarian of Congress."

"Librarian of Congress,
Copyright office,
United States of America.

"I, A. R. Spofford, Librarian of Congress, hereby certify that the foregoing is a true copy of the original record of copyright in the Library of Congress.

"In witness whereof I have hereunto set my hand and affixed the seal of my office, this 11th day of May, 1878.

"A. R. SPOFFORD,
Librarian of Congress.

"Two copies of the above publication deposited December 6, 1876."

To the introduction of the portion of said paper in the following words, viz: "Two copies of the above publication deposited De-

cember 6, 1876," Merrell, defendant below, then and there duly objected, on the grounds that the same was no part of the certificate; that it was a mere anonymous statement, when and by whom made does not appear, and is incompetent, etc., which objection the court overruled and permitted it to be read to the jury, to which action of the court he then and there duly excepted.

Respondent gave evidence tending to prove that his forecasts of the weather in Merrell's Almanac for 1877 were copied from respondent's almanac by direction of defendant below, with colorable alterations, and that defendant below published 90,000 of his almanacs containing said forecasts, and that he sent 45,000 of them to his, Merrell's customers, which were distributed.

Also, evidence to show Tice's profits on 45,000 of his almanacs, if so many had been sold at the rate at which he was selling his almanacs, would have been more than 1,980 dollars. Also, that the whole edition of Tice's almanac was 15,000, and that his whole edition was sold by him before 1st May, 1877, except 500 copies, and that his said edition was not stereotyped, and that the net profit on the sale of the edition of 15,000 was $800; also, evidence tending to show that in April, 1877, people claimed that Merrell's Almanac for 1877 contained the same forecasts as Tice's Almanac under his copyright, in about a dozen instances, and for that reason declined to purchase Tice's Almanac; also, that Tice commenced sales of his almanac about December 1st, 1876, and sold all but four or five hundred by April, 1877, and that all were sold by the middle of June, ensuing.

The foregoing was all the evidence offered by respondent.

Merrell, defendant below, put in evidence tending to impeach one of plaintiff's witnesses and to prove that defendant's almanacs containing said forecasts, were gratuitously distributed by Merrell as advertisements of his wholesale drug business, and that he never sold any of said almanacs, and that it was published after the 1st of May, 1877.

Defendant, Merrell, offered in evidence forecasts of the weather for 1877, contained in J. H. McLean's almanac for that year, in relation to which prior evidence had been given, tending to show it to be a pirated edition of Tice's forecasts, and compromised between Tice and McLean, and in connection therewith he offered evidence to prove that said McLean's almanac was published long before Merrell's, and that 3,000,000 copies of said McLean's almanac were distributed, and that McLean's forecasts were substantially the same as Tice's for that year, but the court excluded said evidence, and Merrell then and there duly excepted.

Defendant Merrell also gave evidence tending to prove that Tice made forecasts for him for 1876 for $75, and offered to do so for 1877 for $250, which Merrell refused.

The foregoing was all the evidence offered by defendant, Merrell, and both parties rested.

Thereupon the court charged the jury "that if they were satisfied from the evidence that the plaintiff had complied with the requirements of the law touching the acts to be performed by him, that is, before the publication of his almanac for 1877 he had delivered at the office of the Librarian of Congress, or deposited in the mail addressed to said Librarian, at Washington, District of Columbia, a copy of the title of said almanac; and that he had also, within ten days after the publication thereof, delivered at the office of said Librarian, or deposited in the mail addressed to said Librarian, at the said city of Washington, two copies of said almanac; and if they were further satisfied from the evidence that the defendant had in his almanac for the year 1877 copied the forecasts of the weather contained in the plaintiff's said almanac, then they should find for the plaintiff, and that a literal and exact copy was not necessary to constitute an infringement; that a substantial copying, with colorable changes only, was sufficient to constitute an infringement; and further, that if they found for the plaintiff, they might presume, in the absence of countervailing testimony, that plaintiff would have sold as many copies of his almanac, as defendant had distributed copies of the pirated work, or that prima facie the number of almanacs distributed by defendant, was the number plaintiff would have sold, had the defendant not pirated plaintiff's work, and that accordingly, in assessing plaintiff's damages, the jury should assess against defendant the total amount of net profits which they believe from the evidence plaintiff would have realized, from the sales of as many of plaintiff's almanacs, as was the number of defendant's almanacs distributed, unless countervailing testimony had shown the damages or net profits, to be less"

The jury found, under this charge, for plaintiff $1,980.

Defendant, Merrell, within four days moved for a new trial—among other reasons because there was no sufficient evidence that plaintiff had within ten days after publisher had delivered at the office of the Librarian, or deposited in the mail addressed to the Librarian, etc., two copies of said copyright almanac; because the damages were excessive; because the court had admitted illegal evidence for plaintiff, and had excluded proper evidence offered by defendant, and because of error in law in the charge to the jury, etc. (For motion for new trial see pp. 21 and 22 of printed record.)

The court overruled said motion, and defendant duly there and then excepted, and brings the case here on writ of error.

Plaintiff in error assigns for error the following, to-wit:

1. That the court erred in admitting in evidence against defendant's objection, the words "Two copies of the above publication deposited December 6, 1876," below the seal and signature of the Librarian, the same being incompetent.

2. That the court erred in excluding the evidence offered in relation to J. H. McLean's almanacs.

3. In the charge of the court to the jury, instructing them to presume that plaintiff would have sold as many almanacs as defendant distributed or given away, and that prima facie the number of almanacs distributed, gratuitously by defendant, was the number plaintiff would have sold, and that they should assess against defendant the total net profits, which the plaintiff would have realized from the sales, of as many almanacs as defendant distributed, to his customers; or, in other words, that the court erroneously charged the jury as to the rule of damages on the facts in evidence, that the charge did not require the jury to find that respondent gave notice of his copy-right as required by Section 4962, and that there was no proof of such notice.

4. That the damages were excessive.

5. That the court erred in overruling the motion for new trial.

BRIEF.

I.

The court erred in admitting in evidence the unauthenticated statement as to the depositing two copies of the book, at the foot of the Librarian's certificate, and below his signature and seal.

1. The proof did not correspond with the allegation of the petition.

There are two modes of complying with act of Congress as to furnishing two copies of a copyright work. One is to deposit them in the mail addressed to the Librarian, and the other is to deposit them directly with the Librarian.

"Sec. 4956. No person shall be entitled to a copyright unless he shall, within ten days from the publication thereof, deliver at the office of the Librarian of Congress, or deposit in the mail, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright book," etc.

The Missouri code of practice, adopted by the U. S. Circuit for the Eastern District of Missouri, requires a party to state the facts of his case, and he is required to prove his case as he alleges it.

Respondent, in his petition, avers a compliance with the act of Congress on this point, by depositing "in the mail at the city of St. Louis, Missouri, addressed to the Librarian of Congress, at Washington, District of Columbia, postage prepaid, two printed copies of the said book."

It was optional with respondent which of these two modes he should adopt, but when he had adopted one mode, and averred that in his petition, and it had been put in issue, I contend that he should have been held to the proof of it as he had alleged it.

The act of Congress provides how he may secure the proof of such deposit in the mail.

"Sec. 4961. The Postmaster to whom such copyright book, etc., is delivered shall, if requested, give a receipt therefor."

Having alleged that mode, he should not have been allowed to waive, abandon or dodge it, when denied, and spring on defendant, evidence of that mode of complying with the act, which he had not plead, nor given defendant any notice of. The first rule of evidence is that the proof must correspond to the allegations.

1 Greenl'f, ev. p. 51.

Especially should this be so under a code of practice, that requires a party to state the facts of his case.

True, the rule has been modified so as to require only the substance to be proved; yet if the matter alleged be description, it must be proved as alleged.

1 Greenl'f, ev. § 56.

But assuming that it was proper to allow respondent to prove a delivery of the two books, to the Librarian at Washington, instead of requiring him to prove the mailing at St. Louis, as averred in the petition, was it right to allow the unauthenticated statement beneath the seal and signature of the Librarian to be read to the jury to prove a compliance with the act of Congress?

See printed record, p. 19.

That, too, without anything to show when, where or by whom that statement was written.

It does not even appear that it was in the same hand-writing, as the certificate, above the signature and seal.

From the remarks of the Judge who tried the case, in passing on the motion for a new trial (top page 23 of printed record), it appears he had "serious doubts" about the propriety of admitting it, yet he refused a new trial.

He speaks of it as a "technical objection." In this view I totally differ from the Judge. It was a fundamental fact that respondent was bound to prove, and therefore in the highest degree substantial.

Without showing the mailing or depositing of the two copies, Mr. Tice had no copyright, nor any standing in court. His whole title depended on proving that fact, in one of the two ways required by the act of Congress.

See sec. 5956, herein above copied.

Parkinson vs. Laselle, 3 Saw., 330 and 21 Int. Rev. Record 163.
Ewer vs. Cox, 4 Wash., R. 487.
Bourcicault vs. Hart, 13 Blatch'f, 47.
Wheaton vs. Peters, 8 Pet., 591.

From the above cases, as well as section 4956, it is clear that it was a vital and indispensable thing, for respondent to prove the depositing of the two copies, and without proving which, he could have no copyright.

It was an affirmative fact to be shown, and no presumptions could be indulged in. The burden was on respondent to establish it by legal and positive evidence, and the court below was manifestly wrong in speaking of it as a technical objection.

Probably, from the remarks of the Judge in passing on the motion for new trial (p. 237 printed record, near the top), his idea was, that as that statement was on the paper, though below the signature and seal, it was prima facie a part of the paper, and hence entitled to go in evidence without any explanation or authentication, and that the burden was on defendant, to show that it was an addition put there after the signature and seal of the Librarian.

In this I think the court below was clearly wrong. I refer this court to top page 19 of printed record, where it will be seen the entry objected to is wholly below the seal and the Librarian's signature. It is manifest that it was put there after the seal and signature were affixed, and is no part of the certificate.

It was, therefore, an alteration, that, is an addition to the certificate, and appears on its face to be such.

The rule of evidence that if a paper appear to have been altered or added to, and no note made of it, the party offering it must explain it and show when it was done, and that it was done at the time of execution.

1 Greenl'f, ev. 5th ed., § 564.

Such also is the decision of this court.

U. S. vs. Linn, 1 How, 111.

Under the above rule, it devolved on Mr. Tice to explain said addition, and show when and by whom it was put there, and that burden could not be arbitrarily shifted on the defendant, Merrell.

Especially should it not be so shifted in a case like this, where the alteration, i. e., the addition was offered, not to prove any allegation of the petition, but to prove a new and essential fact in respondent's case which he had not plead, nor give defendant, Merrell, any prior notice of.

How could Merrell be prepared to prove that entry was an alteration or addition to the certificate, when an allegation of the petition was not, a depositing of two copies with the Librarian, but a mailing of two copies in St. Louis?

As respondent alleged in his petition a compliance with the statute by mailing two copies in St. Louis, defendant Merrell could not be expected to meet a wholly different character of proof, of which no prior notice had been given him.

The least, the court below should have done, if the allegation of mailing two copies was to be sustained with proof of depositing them with the Librarian in Washington, D. C., would have been, to require respondent to prove the deposit by evidence free from all doubts and suspicions.

But I think there is another and unanswerable objection to the competency of that statement at the foot of said Certificate, even if it was above the signature and seal of the Librarian; and that is that the fact of depositing said two copies with the Librarian, was an act or fact to be proven, like any other fact in the case, by the sworn testimony of a competant witness who knew it.

I can find nothing in the Acts of Congress, that makes the Certificate of the Librarian evidence of the fact of depositing books with him.

It may be conceded in this case that the Certificate of the Librarian, authenticated by the seal of his office, was competent to prove that the *title of the book* had been deposited in his office, because section 4957 requires him to record the title, and authorizes him to give a copy, under the seal of his office, though the section does not in *express terms* make that Certificate evidence, and if the objection had been made, I very much doubt whether the Librarian's Certificate, was legal and competent evidence, to prove even the deposit of the title of the book.

But whether it was so, or not, I totally deny that the Librarian's Certificate, was any legal or competent evidence to prove the deposit of the two copies in his office, if that statement had been over his hand and seal.

The law requires all witnesses, who testify in court, to give their testimony under the sanction of an oath.

1 Greenleaf ev., 5 ed. §328.
1 Philips on ev., 4 Am. ed. Hill & Cowen's notes, p. 14 and following.

The matter to be proven in this case was the *act*, or *fact*, that respondent had deposited two copies of his almanac, with the Librarian of Congress, and when; and this fact, or act, was, like any other fact in the case, to be established by some evidence of some witness who knew it, and who should be subject to cross-examination the same as to any other fact in the case.

I admit that the Acts of Congress have made the certificate of officers evidence of certain things, specified in those acts, but I deny, there is any act of Congress that makes the Certificate of the Librarian, evidence that the author of an alleged copy-right work, has deposited two copies in the office of the Librarian of Congress.

If there be any such act it devolves on respondent to produce it.

To the admission of said written statement, below the signature, defendant Merrell objected as incompetent evidence. (Top page 19 of printed record, and under page 27.)

The court over-ruled the objection, and defendant Merrell duly accepted.

The above statement was the only evidence offered or given by respondent to establish the vital fact of the deposit of the two copies.

I have heretofore shown that by the act of Congress, §4956 and the decisions of the court, that there is not and cannot be any copyright without proving the mailing, or deposit of the two copies.

I submit that I have closely shown that the court below erred in admiting said statement, and on this ground alone there must be a reversal.

II.

The evidence offered by Merrell as to J. H. McLean's almanac for 1877, and excluded by the court should have been admitted.

The offer was to show that the forecasts of the weather in McLean's almanacs were substantially the same as respondent's, and that McLean's almanacs of 3,000,000 were distributed, and were published long before defendant Merrell published his.

The object of this proof was:

1. To rebut the inference that Merrell had copied from Tice.

2. To show that Merrell came into competition, not alone with Tice, but with McLean as well, whose forecasts were substantially the same as Tice's.

3. The evidence was relevant and material as to the number of Tice's sales actually supplanted by Merrell's distribution.

1. If McLean's almanac had been given to the jury, they might have found that Merrell had obtained his forecasts from McLean's, rather than Tice's almanacs: the similarity of Merrell's to both of them being the same, the jury may have found that he had followed McLean's forecasts rather than respondent's.

2 and 3. The evidence was material and relevant as to the number of Tice's sales actually supplanted by Merrell's distribution.

The court in its charge to the jury told them they might presume in the absence of countervailing testimony, that Tice would have sold as many copies of his almanac, as Merrell had distributed, and that *prima facie* the number distributed by Merrell, was the number that Tice would have sold, had Merrell not printed his work, etc.

Now I claim that the evidence offered, as to McLean's Almanacs, was the *countervailing* testimony, that would have met and overcome the presumption and *prima facie* case that the Court spoke of in its charge to the jury.

If the McLean almanac, with forecasts substantially the same as Tice's, had been in evidence, the jury under the instruction of the Court might have found that Merrell's 45,000 almanacs supplanted equally Tice's and McLean's, *i.e.*, 22,500 of Tice's instead of 45,000 as they must have found the total number in order to

render a verdict of $1,980. In such case the verdict would have been $990 instead of $1,980.

The testimony was relevant, as countervailing testimony, and as such should have been admitted.

III.

The charge to the jury was erroneous in several particulars. Before considering it I will state the substantial facts contained in the bill of exceptions, so far as the question of damages is concerned.

Substantially the evidence tended to show that respondent had published an edition of 15,000 almanacs, containing his copy-right forecasts of the weather for 1877. Those forecasts were an addition to the ordinary almanac, and formed only the foot-notes thereof, and that the profits on the 15,000 almanacs was about $1800, or about 5 cents a copy. There was no evidence that the almanac was stereotyped, or that respondent contemplated printing more; that defendant Merrell printed about the 1st of May, 1877, certainly not before April, 1877, about 90,000 of his almanacs, containing the alleged infringements of respondent's fore casts of the weather, of which he distributed gratuitously about 45,000 as advertisements among his customers; that respondent began the sales of his almanacs about 1st December, 1876, and had sold all but about 400 or 500 by April, 1877, and that all were sold by the middle of June following: that in April, 1877, about a dozen persons refused to buy respondent's almanacs on the ground, that Merrell's almanacs contained the same fore casts, as respondent's almanacs; nevertheless he sold by the middle of June, 1877, all he had printed.

That Merrell's almanac was not published till about 1st May, 1877, certainly before April, 1877, and that he distributed them as advertisements, his drug and medicine business, and never sold any.

The proof further showed that respondent made his fore casts of the weather for Merrell's almanac for 1876 for $75, and offered to make or furnish his copy-righted fore casts of 1877 for Merrell's almanac of 1877 for $250, which Merrell declined to pay.

On the above evidence the court charged the jury as follows: (See top of page 21 of printed record.) "And further, that if they found for the plaintiff, they might presume, in the absence of countervailing testimony, that plaintiff would have sold as many copies of his almanac as defendant had distributed copies of the pirated work, or that prima facie the number of almanacs distributed by defendant, was the number, plaintiff would have sold, had the defendant not pirated plaintiff's work, and that, accordingly, in assessing plaintiff's damages, the jury should assess, against the de-

fendant, the total amount of net profits which they believe from the evidence, plaintiff would have realized from the sales of as many of plaintiff's almanacs, as was the number of defendant's almanacs distributed, unless countervailing testimony had shown the damages or net profits to be less."

This charge and declaration of law was erroneous as applied to the facts of the case before the jury in several particulars.

1st. The court tells the jury that they "might presume in the "absence of countervailing testimony that plaintiff would have sold "as many copies of his almanac as defendant had distributed" &c., *i. e.*, gratuitously given away.

Section 4964 of R. S. of U. S., 2d Ed., delares that every person who infringes a copy-right "shall forfeit every copy thereof to "such proprietor, and shall also forfeit and pay such damages as "may be recovered in a civil action by such proprietor in any court "of competent jurisdiction."

This statute unquestionably means under the decisions of the courts in patent and trade mark cases and other analogous cases, "actual damages" and nothing more.

Now actual damages must be proven by evidence, and established like any other fact in a case, and the burden is on plaintiff to prove them.

Seymour *et. al.*, *vs.* McCormick, 16 How., 480, 486, and following:

Corporation of N. Y. *vs.* Ransom, *et. al.*, 23 How., 487.
Philp *vs.* Nock, 17 Wall., 460, *462*.
Packet Co *vs.* Sickles, 19 Wall., 511, *617*.
Burdell *vs.* Denig, 92 U. S,, 716, *719*.
Blake *vs.* Robertson, 94 U. S., 728, *733*.
Ingersoll vs. Musgrove, 14 Blatch'f 541, 543—4.
Leather Cloth Co. vs. Hirschfield, 1 Law R. (equity cases) 298.

I rely on the above cases to establish the error in the charge to the jury. I might refer to others, but deem it unnecessary, as they cover all the points I make, and make it clear, I think, that the instruction of the court on the facts of the case, was erroneous.

1. The charge shifts the burden of proving his damages from respondent, on whom it rested, to defendant Merrell, to show by countervailing evidence the contrary of that presumption.

2. The question whether respondent would have sold as many of his almanacs as defendant Merrell gratuitously distributed, was a question of fact to be found by the jury in view of the evidence, and not a question of law, independent of the evidence in the case.

"What a patentee would have made if the infringer had not in-

terfered with his rights," say the Supreme Court in 16 How., p. 490," is a question of fact, and not a 'judgment of law.' The question is not what speculatively he may have lost, but actually what he did lose.' "

14 Blatch'f, 543.

The jury are told they "might presume," not from the evidence in the case, but independently and without evidence, that plaintiff would have sold as many of his almanacs as defendant gave away, unless defendant by countervailing testimony should show the contrary.

Is this the law in the light of the cases above cited? In 14 Blatch'f 544, the court say plaintiff must prove he would have sold more but for the infringement.

On the facts before the jury they could not truthfully or logically draw the presumption that the court tells them to draw.

The proof showed that plaintiff had sold every copy of his work, without any reduction of price, by reason of Merrell's infringement, and there was no evidence that respondent had stereotyped his work or intended or was able to print or furnish any more.

If the jury had been instructed, as they should have been, to ascertain from the evidence how many sales respondent lost, by defendant's infringement, they could only find under the evidence that he lost no sales, for he had sold all he printed, and furnished no evidence that he intended to print more, or that he was prevented by defendant's infringement from printing more.

Yet the jury are told absolutely as a matter of law and in disregard of the evidence, to find that plaintiff would have sold as many as Merrell distributed. This in face of the evidence that he had not a single unsold copy.

It is not true, either in law or fact, that respondent, if he had on hand 45,000 almanacs, could be presumed to have sold them, because defendant gave away that number. Everybody might take an almanac when given to them, but it does not follow from that fact, that every person, or any person, who would accept it as a gift would buy it. At any rate, the question whether they would, or would not buy, is a question of fact, and not a "judgment of law," and should have been submitted to the jury to find from the evidence, and should not have been laid down to them as a rule of law,

It should have been submitted to the jury to find from the evidence how many sales respondent lost by Merrell's acts: the court takes the question away from the jury, and decides the fact itself.

3. The second clause of the instruction, to-wit; "That prima facie the number of almanacs distributed by defendant was the number plaintiff would have sold had the defendant not pirated plaintiff's work," is equally erroneous, as is the next following

direction to assess for plaintiff the profits on as many almanacs as defendant had distributed, "unless countervailing testimony had shown the damages or net profits to be less."

In this branch of the charge the court actually finds the fact that plaintiff would have sold as many almanacs as defendant distributed, and thereby took that question of fact from the jury.

The court assumes as a matter of law that plaintiff would have sold as many almanacs as defendant distributed, instead of submitting to them to find, from the evidence, how many he would have sold.

In Goodyear vs. Bishop, 2 Fisher Pat. cases, p. 152, especially on page 159, the court expressly declares that it is for the jury (not the court) from the evidence before them, to be satisfied that the plaintiff would have made the goods and realized the profits, if defendant had not interfered. The jury were to examine the evidence, and say, whether the evidence satisfied them that any, and how many customers, were diverted from plaintiff, and whether plaintiffs were prepared to supply, and were prevented from supplying, the articles made by defendants; in short, whether plaintiffs by competition of defendants were hindered or interfered with in their business or otherwise actually damaged at all or not.

So in the case at bar; but the court took the fact away from the jury and found the fact itself, though the proof showed the contrary of the finding, and that plaintiff Tice had sold all his almanacs, and did not have any more to supply, and therefore in fact was not actually damaged at all, as he sold all he had, notwithstanding the acts of defendant Merrell.

The evidence showed that defendant Merrell did not print his almanac till May, or not earlier than April, when the year was nearly half gone, for sale of almanacs for the year 1877.

4. The evidence also showed that the infringement of defendant Merrell did not apply to plaintiff's whole almanac, but only to a small part of it, to-wit: the foot notes, containing his fore-casts of the weather; in fact, the fore-casts were alone copy-righted.

The court wholly ignores this fact in its instructions, and tells the jury to give to plaintiff the profits on the sale of the whole almanac. This was error.

Seymour vs. McCormick, 16 How. 490, where this court expressly declares that in case of an infringement of an improvement to a machine, there cannot be a recovery for the whole machine, but only for the part infringed.

Philp vs. Nocks, 17 Wall. 462.
Blake vs. Robertson, 94 U. S. 733-4.

Now plaintiff wholly failed to show what part of his profit was owing to the forecasts of the weather, which was only a part of his almanac. He proved his profit on the *whole almanac*, and with the

proof, showing that only a part of it was infringed, the jury are told to give plaintiff the profit on the whole almanac. In the light of the foregoing cases, the instruction was wrong, and plaintiff was entitled to only nominal damages, unless he showed by satisfactory evidence, what part of the whole profit accrued from the infringed forecasts.

5. The sum of $250 was the utmost, under a correct application of the law to the facts, and the case, that plaintiff could be entitled to recover.

It was in evidence that for 1876, when plaintiff had his forecasts for that year copyrighted, he furnished them to defendant, Merrell, for $75, and offered to furnish them to him for 1877 at $250.

Now the law in patent cases, and which is equally applicable to copy-rights is, that in suits at law for an infringement, the proper measure of damages is the royalty or license fee where one is established and proven.

See Seymour *vs.* McCormick, 489 and following.
Corp. of N. Y. *vs.* Ransom, 23 How., 489.
Philp *vs.* Nock, 17 Wall., 462.
Packet Co. *vs.* Sickles, 19 Wall., 617.
Burdell *vs.* Denig, 92 U. S., 719.

Now the evidence was such before the jury as required it to be submitted to them, as a question of fact, whether plaintiff had fixed a license fee for the use or publication of his forecasts of the weather. If he had, that was a measure of his damages, and should have been so declared. The record shows that plaintiff offered to furnish his copy-right forecasts of the weather for 1877 to defendant for his almanac for that year for $250, and had actually done it for 1876 for $75.

Under proper instructions which the court should have given to the jury, they could not under any aspect of the case have found plaintiff's damages beyond this sum, and all beyond this sum is excessive, "speculative," "imaginary," or "fanciful" instead of "actual." Those are the terms of this court, applied to a rule like that laid down in this case.

16 How., p. 490, near bottom of the page.

The instruction of the court is further fatally defective in not requiring the jury to find that the plaintiff had caused to be printed on each of his almanacs the notice or caution required by Section 4962.

Section 4962 declares that "No person shall *maintain an action* "for the *infringement* of his copy-right unless he shall give notice "thereof by inserting in the several copies of every edition pub- "lished, on the title page or the page immediately following, the "following words: 'Entered according to act of Congress in "the year ——, by (A B) in the office of the Librarian of Congress

"at Washington.'" This element, essential to plaintiff's title, was left out by the Court, and renders its charge to the jnry fatally defective in another particular.

Drone on copy-rights, p. 265.

The above section declares no action shall be maintained unless such notice is given. But the charge to the jury does not require them to find as to that matter. An essential element of plaintiff's right is wholly left out by the court, and he is released from proving it, and the jury from finding it.

I wish to say that I did not try the case in court below, and only came into it after the judgment was rendered. Had I been engaged in the trial, I think I should have asked instructions on the points I have named herein—and had an express ruling upon them.

The court assumed of its own motion to declare the law, as applicable to the facts of the case, as it was its duty to do, and it was its duty to declare it correctly—neither to declare that to be law which was not law, nor omit to lay down the law that the facts of the case required.

A motion for new trial was in due time filed, in which all the points herein made were urged upon the court, and the court had an opportunity to correct its errors, in its rulings on the evidence, and in its charge to the jury; but though it had serious doubts, refused to do so, and thereby an unjust verdict and excessive damages have been fastened on defendant Merrell, and I submit, that plaintiff in error has herein pointed out errors in the admission of incompetent testimony in behalf of respondent, and the exclusion of competent evidence offered by defendent Merrell, and in the charge to the jury, that will entitle him to a reversal of the judgment herein at the hands of this court, which he now respectfully asks by

M. L. GRAY,

His Attorney.

SUPREME COURT U
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Supreme Court of the United States

No. 198.

JACOB S. MERRELL,
Plaintiff in Error,
vs.
JOHN H. TICE,
Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT AND BRIEF.

COLLINS & JAMISON.

Of Counsel for Defendant In Error.

Supreme Court of the United States

No. 198.

JACOB S. MERRELL,
Plaintiff in Error,
vs.
JOHN H. TICE,
Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Statement and Brief by Collins & Jamison, of Counsel for Defendant in Error.

STATEMENT OF THE CASE.

This was an action, under the statutes of the United States, for damages alleged to have been suffered by the plaintiff, through the piracy by the defendant of an almanac for the year 1877, published by the plaintiff, and upon which plaintiff had secured a copyright under the provisions of the laws of the United States.

On the 13th of November, 1876, John H. Tice, the plaintiff, deposited in the office of the Librarian of Congress a printed copy of the title of "*Professor Tice's Almanac for the year 1877*," and on the 1st of December, 1876, published said Almanac, having printed on the title page thereof the words: "Entered according to act of Congress, in the

year 1876, by John H. Tice, in the office of the Librarian of Congress, at Washington. All rights reserved."

On the 6th of December, 1876, plaintiff deposited in the office of the Librarian of Congress two copies of said publication. The evidence of this fact is contained in the certificate of the Librarian of Congress in the following order, to-wit:

"LIBRARIAN OF CONGRESS COPYRIGHT OFFCE, UNITED STATES OF AMERICA. LIBRARY OF CONGRESS, COPYRIGHT OFFICE, WASHINGTON.

"No. 12,579 G.

"To-wit: Be it remembered that on the 13th day "of November, Anno Domini, 1876, John H. Tice, "of St. Louis, Mo., has deposited in this office the "title of a book, the title or description of which is in "the following words, to-wit: '*Professor Tice's Alma-*"*nac for the year 1877*, with forecasts for every day, "based upon the theory that there are meteorological "cyles that are fixed and determined by astronomical "events. According to this theory, there are four points "on the ecliptic which no planet can pass without cre-"ating electric disturbances that affect the whole solar "system. Each planet, therefore, in every revo-"lutionon its orbit, occasions four meteorological cycles, "St. Louis, Mo.' The right whereof he claims as pro-"prietor in conformity with the laws of the United "States respecting copyrights.

"LIBRARIAN OF CONGRESS, COPYRIGHT OFFICE, UNITED STATES OF AMERICA. (Signed), A. R. SPOFFORD, LIBRARIAN OF CONGRESS.

"I, A. R. Spofford, Librarian of Congress, hereby "certify that the foregoing is a true copy of the orig- "inal record of copyright in the Library of Congress.

"In witness whereof, I have hereunto set my hand, "and affixed the seal of my office, this 11th day of "May, 1878.

A. R. SPOFFORD,

Librarian of Congress.

"Two copies of the above publication deposited De- "cember 6, 1876."

This almanac contained forecasts of probable weather for every day of the year, 1877.

The defendant also published an almanac for said year, 1877, which contained forecasts of probable weather for every day of said year.

The evidence clearly demonstrated that the defendant's forecasts were substantial copies of plaintiff's forecasts, and that defendant had *designedly* copied this portion of his almanac from the publication by plaintiff, which he *knew* to be copyrighted.

The plaintiff issued his work for sale, and was enabled to make a net profit of 4 4-9th cents per copy upon each copy sold.

The defendant printed 90,000 copies of his pirated copy, and being a wholesale and manufacturing druggist, sent out to retail drug-stores, his customers, 45,000 copies of his almanac which were gratuitously distributed.

The defendant offered to prove that one J. H. McLean, had circulated gratuitously about 3,000,000 copies of another pirated edition of Tice's forecast for said year 1877, published by said McLean as "Dr. McLean's Almanac."

Defendant also offered evidence tending to show that plaintiff had offered to sell to defendant his forecasts for said year, 1877, for the sum of $250, which offer defendant refused.

On the trial, the Court, the Hon. Samuel Treat, overruled defendant's objection to that portion of the Librarian's certificate which states, "two copies of the above publication deposited December 6, 1876," sustained plaintiff's objection to the introduction of the testimony concerning the McLean almanacs, and in regard to the measure of damages, charged the jury, that if they found for the plaintiff, they might presume, in the absence of counteracting testimony, that plaintiff would have sold as many copies of his almanac as defendant had distributed copies of the pirated work, or that, *prima facie*, the number of almanacs distributed by defendant was the number plaintiff would have sold had the defendant not pirated plaintiff's work, and that, accordingly, in assessing plaintiff's damages, the jury should assess against the defendant the total amount of net profits which they believed from the evidence plaintiff would have realized from the sales of as many of plaintiff's almanacs as was the number of defendant's almanacs distributed, unless counterrailing testimony had shown the damages or net profits to be less.

Under the evidence before them and the charge of the Court, the jury found a verdict in favor of the plaintiff, and assessed his damages at $1,980.

The defendant moved the Court for a new trial, and the principal points of error therein assigned will be noticed and answered in the following

BRIEF FOR DEFENDANT IN ERROR.

The Court below committed no error in refusing a new trial on the ground of newly discovered evidence.

The affidavits filed with the motion and relied upon by defendant to support this claim have not been made a part of the record of the case in this Court, and this point, therefore, must be taken or abandoned by defendant. At best, the affidavits fail to show that the defendant used due diligence to procure the evidence therein said to have been discovered since the trial, or that said evidence would materially have altered the result of the trial.

The Court below committed no error in refusing to admit the evidence concerning the McLean almanacs.

The publication by any third person of a pirated edition of plaintiff's copyrighted work furnished no excuse in law for defendant's wrong. Neither would the fact that some one else had published a pirated copy of his almanac make any less the damages suffered by plaintiff by reason of the infringement by the defendant. If, *prima facie*, plaintiff is entitled to recover the net profit per copy on each copy of his work for every copy of the pirated work distributed by defendant, the same rule would apply to the McLean almanac, and would in no wise interfere with the recovery against the defendant.

The Court below committed no error in admitting in evidence that portion of the Librarian's certificate containing the words, "two copies of the above publication deposited December 6, 1876.

This certificate contained two perfectly distinct imprints of the seal of the office of Librarian of Congress, and is, we are informed, in all respects in the usual form of certificates

issued from said office. The words objected to were in the same handwriting as the body of the certificate and as the name of the Librarian thereto attached. Whether two copies of the work had been deposited in the Librarian office was a question of fact to be determined by the jury, and they, upon inspection of this certificate, found that such deposits had been made. They had the paper itself before them, and were better able to determine the question from it than any one else can from the printed copy of said paper. The defendant did not and could not prove that such deposit had not been made, for the fact was to the contrary. The objection therefore is purely technical and without merit.

The fact that plaintiff offered to sell his forecasts to the defendant at a stated price is no evidence upon which to base a rule for the measure of damages.

This offer only indicates what was the fact, that at the time it was made Tice contemplated selling his forecasts to Merrell and *to all the almanac makers* at his own price, but failing in this scheme he determined to publish an almanac of his own, and, having done so and having obtained a copyright upon it, he became entitled to all the profit possible to be made thereon, and if defendant, by publishing and distributing a printed copy of such almanac, deprived plaintiff of a portion of the profits on plaintiff's almanac, defendant must respond in damages to that amount. The plaintiff made no proposition to sell to the defendant the *exclusive* right to use his forecasts of weather for 1877.

The Court properly instructed the jury as to the rule for ascertaining the amount of plaintiff's damages.

THE ACTION on the case is the proper action for violation of a copyright.

Rev. Stat. U. S., sec. 4964.
Atwill vs. Ferrett, 2 Blatch. 39.

In the action on the case the true rule for a recovery is the damage actually sustained. Of this there can be no question. The only enquiry that can be made is how shall, in the given case, the actual damage suffered be ascertained.

Is it necessary that plaintiff should have the testimony of each person who has come into possession of defendant's almanac, and by him show that had he not been able to procure defendant's work he would have purchased that of the plaintiff? Is it not sufficient, as in the case at bar, to prove the number of copies distributed by defendant, and to *presume* that for every work the defendant distributed the plaintiff lost the sale of one? To require the evidence above stated would operate to render totally valuless the right conferred by the copyright laws of the United States.

It ill becomes a defendant convicted by a jury of designedly pirating a work that he knew to be copyrighted to insist upon a method of proof which would defeat the very object of a law intended to punish him, and for the same reason defendant occupies a very different position from an unintentional wrongdoer, in an action sounding in tort.

In a case (Taylor vs. Carpenter, 2 Wood. & Minot 1.) which appears to be in all respects parallel to the one at bar, Judge Woodbury says "That the jury should have given more than nominal damages, I have no doubt, and I have as little doubt that there were materials enough in the case from which to estimate actual damages, such as the probable extent of sales by the defendant under these works, and the loss of sales and profits therein by the plaintiff. Proving large sales by the defendant, as and for the plaintiff they proved a *probable* loss of such sales by themselves and

ought to recover for that, as they lost the usual profits on sales to that amount."

See also upon this point
West vs. Rice, 9 Met. 564.

The judgment of the Court below should therefore be affirmed.

COLLINS & JAMISON.

Of Counsel for Defendant In Error.

14-562

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 157.

DANIEL H. ELWOOD, PLAINTIFF IN ERROR,

vs.

PATRICK M. FLANNIGAN, IMPLEADED WITH EDWARD SORIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JANUARY 14, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 157.

DANIEL H. ELWOOD, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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For that whereas the said plaintiffs were, on the first day of April, in the year of our Lord one thousand eight hundred and seventy-seven, possessed of the undivided moiety or one-half interest of a certain piece, parcel, or lot of ground or real estate, with the appurtenances, situate in Cook County, State of Illinois, in the said district, and known and described as follows, to wit:

All that part of fractional section seven (7), township thirty-seven (37) north, range fifteen (15) east of the third (3d) principal meridian,
4 lying south of the Indian boundary line in Cook County, Illinois, which said premises the said plaintiffs jointly claim as an undivided moiety or one-half interest in fee simple in said premises; and the said plaintiffs being so possessed thereof, the said defendants afterwards, to wit, on the second day of April, in the year of our Lord one thousand eight hundred and seventy-seven, entered into the said premises and ejected the said plaintiff therefrom and unlawfully withheld from the said plaintiffs the possession thereof, to the damage of said plaintiffs of one hundred thousand dollars, and therefore they bring suit, etc.

SCATES AND HYNES,
Attorneys for Plaintiffs.

(Endorsed:) Filed this 7th day of April, 1877. Wm. H. Bradley, clerk.

And on the same day, to wit, the 7th day of April, A. D. 1877, a writ of summons issued out of said clerk's office to said defendants in said entitled cause, which said writ, together with the return of the marshal endorsed therein, is in the words and figures following, to wit:

Writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss:

5 The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Edward Sorin and Patrick Flanigan, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of May next, to answer unto Benjamin S. Sooy and Daniel H. Elwood of a plea of ejectment to their damage, as it is alleged, of one hundred thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this seventh day of April, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the 101st year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

I did not serve the within writ, being unable to find the within named within my district. Dated May 7, 1877.

JESSE S. HILDRUP,
U. S. Marshal,
By L. O. GILMAN, *Dep'y.*

6 (Endorsed:) Filed May 8th, A. D. 1877. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 4th day of June, A. D. 1877, an alias writ of summons issued out of said clerk's office against said defendants in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Alias writ of summons.

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you again to summon Edward Sorin and Patrick Flanigan, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of July next, to answer unto Benjamin S. Sooy and Daniel H. Elwood of a plea of ejectment to their damage, as it is alleged, of one hundred thousand dollars, and have you then and there this writ.

7 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 4th day of June, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the 101st year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

I have served the within writ by reading the same to and within the presence and hearing of Patrick M. Flanigan, herein named, on the 21st day of June, 1877.

JESSE S. HILDRUP,
U. S. Marshal,
By L. O. GILMAN, *Deputy.*

But I did not serve Edward Sorin, therein named, as I was not able to find him in my district.

JESSE S. HILDRUP,
U. S. M.,
By L. O. GILMAN, *Dep.*

(Endorsed:) Filed Jun, 27, 1877. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 29th day of June, A. D. 1877, said
8 defendant, Patrick M. Flannigan, by his attorney, filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea of Patrick M. Flannigan.

Circuit court of the United States, northern district of Illinois. May term, A. D. 1877.

BENJAMIN S. SOOY AND DANIEL H. ELWOOD
vs.
EDWARD SORIN AND PATRICK M. FLANNIGAN. } Ejectment.

And the said defendant, Patrick M. Flannigan, by F. W. Young, his attorney, comes and defends the wrong and injury, when, &c., and says

that he is not guilty of unlawfully withholding the premises in said declaration mentioned, or any part or portion thereof, in manner and form as the plaintiff has above thereof complained against him, and of this the said defendant, Patrick M. Flannigan, puts himself upon the country.

F. W. YOUNG,
Att'y for Def't, Patrick M. Flannigan.

(Endorsed:) Filed June 29, '77. Wm. H. Bradley, cl'k.

9 Afterwards, to wit, on the 21st day of January, A. D. 1878, in the December term, A. D. 1877, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, in the following entry, to wit:

BENJAMIN S. SOOY AND DANIEL H. ELWOOD
vs.
PATRICK M. FLANIGAN, IMPLEADED WITH EDward Sorin. } Ejectment.

Now come the parties, by their attorneys, and upon issue joined upon the plea of the defendant, Patrick Flanigan, thereupon come a jury of good and lawful men, to wit, S. W. Kingsley, A. H. Heald, William H. Coulston, Smith McClevey, Elias Braman, Thornton G. Haines, Nathaniel Vose, R. R. Kelley, C. A. Baker, Herman Buerning, Truman L. Pratt, and Charles P. Lyman, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 22d day of January, A. D. 1878, in the said December term, A. D. 1877, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry
10 W. Blodgett, district judge, is the following entry, to wit:

BENJAMIN S. SOOY AND DANIEL H. ELWOOD
vs.
PATRICK M. FLANIGAN, IMPLEADED WITH EDward Sorin. } Ejectment.

Now come the parties again, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the arguments of the plaintiffs' counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We, the jury, find the defendant not guilty. And thereupon the plaintiffs, by their attorney, move the court for a new trial herein.

Afterwards, to wit, on the 5th day of March, A. D. 1878, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

BENJAMIN S. SOOY AND DANIEL H. ELWOOD
vs.
PATRICK FLANIGAN, IMPLEADED WITH EDward Sorin. } Ejectment.

11 The motion of the plaintiffs heretofore entered herein for a new trial of this cause having this day been called up for hearing, and

the plaintiffs and their attorneys failing to appear and support the same, the court overrules said motion. It is thereupon considered and adjudged by the court that the defendant, Patrick Flanigan, be discharged, and that he go hence without day, and that he have and recover of the plaintiffs his costs and charges about his defence in this behalf expended, amounting to the sum of twenty-eight dollars and sixty-five cents, and that he have execution therefor.

Afterwards, to wit, on the 12th day of April, A. D. 1878, in the said adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

BENJAMIN S. SOOY AND DANIEL H. ELWOOD
vs.
PATRICK FLANIGAN, IMPLEADED WITH EDward Sorin. } Ejectment.

The plaintiffs having heretofore moved the court upon affidavits
12 filed for a new trial of this cause, and the same having been argued by the counsel of the respective parties, and the court being now sufficiently advised thereon, overrules said motion and orders that the judgment herein stand in full force.

Afterwards, to wit, on the 20th day of April, A. D. 1878, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

BENJAMIN S. SOOY AND DANIEL H. ELWOOD
vs.
PATRICK FLANIGAN, IMPLEADED WITH EDward Sorin. } Ejectment.

Now come the plaintiffs, by their attorney, and move the court to set aside and vacate the judgment and verdict entered herein on the fifth day of March last, and for a new trial, and it appearing to the court that all the taxed costs herein have been paid by the plaintiffs, it is thereupon ordered that said judgment and verdict be set aside and vacated, and a new trial granted under the statute.

Afterwards, to wit, on the 26th day of June, A. D. 1878, in the adjourned May term of said court, in the record of the proceedings
13 thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

BENJAMIN S. SOOY ET AL.
vs.
PATRICK M. FLANIGAN, &C. } Ejectment.

Now come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: Hilliard H. Perry, DeWitt S. Sears, M. J. Brown, Thomas Poor, Nelson Landon, Ebenezer Barry, Thomas White, L. J. Cobb, Oliver S. Lincoln, W. D. E. Andrus, J. A. Mahannah, and Walter R. Cornell, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of

the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

And afterwards, to wit, on the 27th day of June, A. D. 1878, in the said adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

BENJAMIN S. SOOY AND DANIEL H. ELWOOD
v.
PATRICK FLANIGAN, IMPLEADED WITH EDward Sorin. } Ejectment.

14 Now come again the parties, by their attorneys, and now come also the jury in this behalf empanneled and sworn, and after hearing the concluding evidence and the arguments of the plaintiffs' counsel and receiving the instructions of the court the jury returned the following verdict, to wit: We, the jury, find the defendant, Patrick Flanigan, not guilty. And thereupon the plaintiffs, by their attorney, move the court for a new trial, and the court being now sufficiently advised thereon overrules said motion. And on motion of the plaintiffs' attorney for judgment herein, it is thereupon considered and adjudged by the court that the defendant, Patrick Flanigan, impleaded as aforesaid, be discharged, and that he go hence without day, and that he have and recover of the plaintiffs his costs and charges in this behalf expended about his defence, amounting to the sum of thirty dollars and ten cents, and that he have execution therefor.

And on the same day, to wit, the 27th day of June, A. D. 1878, at the trial of said cause, the following exceptions were taken and allowed by the court and made of record in said entitled cause, and are in the words and figures following, to wit:

Bill of exceptions.

15 STATE OF ILLINOIS,
Cook County, ss:

BENJAMIN S. SOOY ET AL.
vs.
PATRICK M. FLANIGAN. } Ejectment.

Be it remembered that on the trial of the above cause the plaintiffs, to maintain the issue on their behalf introduced the treaty between the United States and the chiefs and warriors of the Pottawottomies of the State of Indiana and Michigan Territory, made and concluded on the Tippecanoe River, in the State of Indiana, on the 22d day of October, 1832, printed in the [*7th vol. of] United States Statutes at Large, pp. 399–403, and read in evidence from said treaty the third article thereof, wherein and whereby "the United States agree to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them by patent" (among others) "Ashkum, two sections." "The foregoing reservations shall be selected under the direction of the President of the United States, after the lands shall

* In pencil.

have been surveyed, and the boundaries to correspond with the public surveys."

The plaintiffs read in evidence a certified copy of the selection
16 and approval of the same by the President of the United States on the 29th day of March, A. D. 1837, of "section seven (7), town. thirty-seven (37) north, range fifteen (15) east of the third (3d) principal meridian," in Cook County, Illinois.

"The line of the treaty of 1816 runs through this section, and the northeast and northwest fractional quarters have been sold. No plat in General Land Office. This is one of the sections originally selected for this reserve."

The plaintiffs also read in evidence a certified copy of a patent for said section as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 25th, 1877.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed on pages one and two is a true and literal exemplification of the original patent issued in favor of Ash-kum, November 3, 1864, as it appears of record in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] J. A. WILLIAMSON,
Commissioner of General Land Office.

17 The United States of America to all to whom these presents shall come, greeting:

Whereas by the third article of the treaty made and concluded on the Tippecanoe River, in the State of Indiana, on the twenty-seventh day of October, one thousand eight hundred and thirty-two, between Jonathan Jennings, John W. Davis, and Marts Crume, commissioners on the part of the United States, and the chiefs and warriors of the Potowatomies of the State of Indiana and Michigan Territory, the United States agreed to grant by patent to Ash-kum two sections, to be selected under the direction of the President of the United States, after the lands were surveyed, and the boundaries to correspond with the public surveys.

Now know ye that the President of the United States having approved of the selection of fractional section seven (7), in township (37) thirty-seven north, of range fifteen (15) east of the third (3d) principal meridian east, and adjoining the old Indian boundary line in the State of Illinois, as being one of the sections, and containing four hundred and sixty-five and eight hundredths (465.08) acres, to which the said Ash-kum is entitled under the said treaty. There is, therefore, granted by the United States unto the said Ash-kum and to his heirs the
18 tract of land above described, to have and to hold the said tract, with the appurtenances, unto the said Ash-kum and to his heirs and assigns forever.

In testimony whereof, I, Abraham Lincoln, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this third day of November, in the year of our Lord one thousand eight hundred and

sixty-four, and of the Independence of the United States the eighty-ninth.

By the President:

[SEAL.]

ABRAHAM LINCOLN,
EDWARD D: NULL,
Secretary,
J. W. GRANGER,
Recorder of the General Land Office.

Recorded, vol. 1, page 92, of patents under Potawatomie treaties of 1832.

The plaintiffs then offered proof tending to show by the depositions of witnesses that Ash-kum died intestate in 1846, on Sugar Creek, in the State of Kansas, to which place he was removed in 1837 by
19 the United States under treaty provisions, never having returned to the States of Indiana or Michigan after his removal.

The plaintiffs further offered proof tending to show that Aim-wah-sa and Qua-kee are the grandchildren and only surviving heirs-at-law of Ash-kum and his descendants, all other descendants having died intestate and without issue; that Oche-qua died intestate, leaving her surviving Wah-sha, her husband, entitled, under the statute of Illinois, to one undivided fourth of said section; and the said Aim-wah-sa and Qua-kee, as the only surviving descendants and heirs-at-law of said Ash-kum, are respectively entitled to an undivided one-half of the undivided three-fourths of section seven.

The plaintiffs further introduced in evidence a warrantee deed from Qua-kee in fee simple for his interest, duly acknowledged and recorded, bearing date the 25th day of October, A. D. 1876, conveying said premises to Studley D. Palmer and Benjamin S. Sooy, the latter being one of the plaintiffs in this suit; and also a deed from Studley D. Palmer and wife to Daniel H. Elwood, bearing date the 23d day of March, A. D. 1877, duly acknowledged and recorded, conveying all their interest in said premises, to wit, section seven, to said Daniel H. Elwood, one of the plaintiffs in this suit; and there rested their case.

20 On cross-examination of plaintiffs' witness Qua-kee it appeared that Studley D. Palmer and Daniel H. Elwood purchased of Qua-kee his title to section seven, paying therefor ($25.00) twenty-five dollars cash, and giving him a note for $1,000.00, to be paid only in the event that Palmer and Elwood obtained the land; but if Palmer and Elwood should not be successful in this suit then nothing should be paid on the note.

Thereupon the defendant, Patrick M. Flanagan, upon whom alone process was served, introduced in evidence proof showing that he had made due and diligent search for an original deed purporting to have been executed by Ash-kum on the 24th day of October, A. D. 1835, conveying said section to Louis De Salle; that he had been unable to find the same, and the said deed was not in his possession or power to produce. The defendant also offered oral proof tending to show that Titus B. Willard, whose certificate of acknowledgment appears attached to the certified copy of the deed from Ash kum to Louis De Salle, was on October 4th, 1835, an acting justice of the peace in and for the county of Berrien and Territory of Michigan, and that he had seen him so acting, holding courts, &c.

Thereupon said defendant, in connection with such oral proof,
21 offered in evidence a certified copy of the record of said deed, certified by the recorder of deeds of Cook County, Illinois, and

in connection therewith also offered in evidence certain certificates as certificates of magistracy and conformity, and also offered in evidence the statute of the Territory of Michigan, in force on October 4th, 1855, in reference to acknowledgments, which copy and certificates and the laws of the Territory of Michigan are as follows:

Section 2. Territory laws Mich., page 516.
Section 7. " " " " 189.
Published by authority in 1871.

Book N of deeds, page 353.

Indenture made the twenty-fourth day of October, in the year of our Lord one thousand eight hundred and thirty-five, between Ash-kum, an Indian chief of the Pottawatomie Nation, of the first part, and Louis De Salle, of the township of Niles, in Berrien County, Michigan Territory, of the second part.

Witnesseth that the said part of the first part, for and in consideration of the sum of one thousand dollars, to me in hand paid by the said part of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, remised, released, alienued, and confirmed, and by these presents do grant, bargain, sell, remise, release, alien, and confirm, unto the said part of the second part, and to his heirs and assigns forever, the following described tract of land, viz:

22 Section seven, town. thirty-seven north, range fifteen east of the third principal meridian in the State of Illinois. Together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, or demand whatsoever of the said part of the first part, either in law or equity, of, in, and to the above-bargained premises, with the hereditaments and appurtenances, to have and to hold the said premises as above described, with the appurtenances, unto the said part of the second part, and to his heirs and assigns forever.

And the said part of the first part, for himself, his heirs, executors, and administrators, doth covenant, grant, bargain, and agree to and with the said part of the second part, his heirs and assigns, that at the time of the unsealing and delivery of these presents he is well seized of the premises above conveyed as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and that the above-bargained premises in the quiet and peaceable possession of the said part of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof I will forever warrant and defend.

23 In witness whereof the said part of the first part hath hereunto set his hand and seal the day and year first above written.

his
ASH-KUM. + [L. S.]
mark.

Signed, sealed, and delivered in presence of—
TITUS B. WILLARD.

Aug. ii, one cmcmce one.

TERRITORY OF MICHIGAN,
Berrien County, ss:

Be it remembered that on the twenty-fourth day of October, anno Domini 1835, before me, Titus B. Willard, esquire, one of the justices of the peace for said county of Berrien, came the above-named Ash-kum, an Indian chief, and acknowledged the above-written indenture by him subscribed to be his free act and deed, and desired that the same might be recorded as such according to law.

In testimony whereof I have hereunto set my hand and seal the day and year above written.

TITUS B. WILLARD, [L. S.]
Justice of the Peace.

Recorded 31st May, 1836.

RICHARD J. HAMILTON,
Recorder.

STATE OF ILLINOIS,
County of Cook, ss;

I, Norman T. Gassette, clerk of the circuit court and ex officio
24 recorder in and for said county, in the State aforesaid, do hereby certify that the annexed is a true copy of the record of a certain instrument filed in my office on the 31st day of May, A. D. 1836, and recorded in book No. N of deeds, on page 353.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at Chicago, this 11th day of Oct., A. D. 1870.

{ SEAL OF CIRCUIT COURT } NORMAN T. GASSETTE,
{ OF COOK COUNTY. } *Clerk of the Circuit Court and ex officio Recorder of Cook County.*

LOUIS DE SALLE.

[Five-cent int. revenue stamp.]

STATE OF ILLINOIS,
Cook County, ss:

No. 142955.

I certify this instrument to be filed for record Dec. 31, A. D. 1873. Recorded in book 216 of records, page 621, Jan. 8, 1874.

JAMES STEWART,
Recorder.

[Office of county clerk, Berrien County, Mich. Edwin D. Cook, clerk.]

BERRIEN SPRINGS, , 187 .

STATE OF MICHIGAN,
Berrien County, ss:

I, Edwin D. Cooke, clerk of said county and of the circuit court therein, the same being a court of record and having a seal, do
25 hereby certify that the certificate of acknowledgment by Ash-Kum, an Indian chief, taken before Titus B. Willard, a justice of the peace in and for said county of Berrien, on the 24th day of October, A. D. 1835, as appears on the certified copy of the deed hereto annexed, was executed according to and in conformity with the laws of the

Territory of Michigan, as they existed at the time of taking such acknowledgment; and I further certify that, as appears by the records of and in the office of register of deeds of said county of Berrien, that the said Titus B. Willard was, at the time of taking said acknowledgment, an acting justice of the peace in and for said county of Berrien.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Berrien Springs, this second day of January, A. D. 1878.

{ SEAL OF THE CIRCUIT COURT OF BERRIEN COUNTY, MICHIGAN. }

EDWIN D. COOKE,
Clerk.

STATE OF MICHIGAN,
Office of the Secretary of State, ss:

I, E. G. D. Holden, secretary of state of the State of Michigan, do hereby certify that Titus B. Willard was, on the seventh day of March, one thousand eight hundred and thirty-four, duly appointed justice of the peace for the county of Berrien, as appears from the records
26 in this office; and that the term of office fixed by law at the time of his appointment was three years.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State of Michigan, at Lansing, this twenty-fourth day of December, in the year of our Lord one thousand eight hundred and seventy-seven.

{ THE GREAT SEAL OF THE STATE OF MICHIGAN. }

E. G. D. HOLDEN,
Secretary of State,
By WM. CROSBY, *Deputy.*

To the introduction and reading of each of which in evidence the plaintiffs objected, as legally inadmissible, upon the ground that the same was insufficient in law.

Whereupon, after argument heard, the court overruled the objections, and allowed the defendant to introduce and read in evidence said copy and certificates, to which ruling and decision of the court and the reading of which in evidence the plaintiffs then and there excepted, and the defendant rested.

Thereupon the plaintiffs, in rebuttal, introduced evidence by depositions of the widow, son-in-law, and neighbours of Ash-kum that at no time, from 1832 to the time of his death, did Ash-kum own any property, except his wigwam, usual blankets and bedding, wearing
27 apparel, cooking utensils, a garden hoe, chopping axe, tomahawk, gun and accoutrements, a saddle, and, at one time, three ponies, two of which were stolen from him before he went to Kansas, and that on his way to Kansas an Indian gave him another pony; that he was always poor, and died poor.

The plaintiffs further introduced testimony by depositions of Indian witnesses, acquaintances, neighbors, and parishioners of Father Louis De Salle, grantee in said deed, missionary priest of the Catholic Church, living and laboring among the Pottawottomies and other tribes of Indians in Indiana and Michigan, in teaching and administering religion, that in worldly goods he was poor, and never known, while among them, to have any property, except his wearing apparel, his priestly vestments, bible, breviary, his sleeping apartment and its simple furniture, and lived upon the charitable contributions of his parishioners, and had no other perceptible income or means of support; and that said De Salle was never known to acquire or try to acquire any property, real or personal, as an investment or otherwise; and then rested.

Whereupon the plaintiffs asked the court to give the following instructions:

1. The jury are instructed that under the treaty of Oct. 27, 1832, the title to section 7, agreed to be selected for and granted by
28 patent to Ash-kum, did not pass from the government until the patent was issued, and if the jury believe from the evidence that Ash-kum died before the patent issued, then and in that case the jury are instructed that Ash-kum never was possessed of and confirmed in the legal title or estate to said section in his lifetime.

4 Wheaton, 488.
6 Peters, 261.
6 " 666.
7 " 222.
12 " 264.

2. The jury are instructed that if they believe from the evidence that the United States, by treaty of October 27th, 1832, agreed to grant to Ash kum two sections, of land to be selected under the direction of the President of the United States, after the lands should have been surveyed and the boundaries made to conform to the government surveys, and to convey the same by patent to said Ash-kum, but that afterwards, on the 29th day of March, 1837, the President of the United States approved of the selection under said treaty for Ash-kum of fractional section (7), town. 37 north, range 15 east of third principal meridian, lying south and east of the Indian boundary line in Cook County, Illinois, as one of the sections selected under said treaty for
29 said Ash-kum; and if the jury further believe from the evidence that said Ash-kum moved from the State of Indiana on or about the year 1837 to the Territory of Kansas, under the provisions of treaties, and there remained, having never returned to the State of Indiana or Illinois, and that he died there on or about the year 1846, leaving children and heirs him surviving; and if the jury further believe from the evidence that at the time of the death of said Ash-kum he was not possessed of the legal estate or interest in said section 7, nor had ever been at any time previous to his death possessed of and confirmed in the legal estate in said section; and if the jury further believe from the evidence that no grant or conveyance by patent had ever been made to said Ash-kum by the United States of said section at any time prior to his death, but that after his death, to wit, on the third day of November, 1864, the President of the United States, in fulfilment of said treaty, did grant and convey by patent said fractional section 7 to said Ash-kum and his heirs, then and in that case any deed or conveyance made by said Ash-kum in his lifetime of said tract of land would be inoperative to convey the legal estate and possession in and to said section under the
30 provisions of the act of the general assembly of the State of Illinois (section 7) approved January 31st, 1827 (see Gales' Statutes, page 149; Revised Statutes, 1874, page 273, section 7); but the title in fee in such case passed by this patent to the heirs of Ash-kum.

See Revised Statutes U. S., p. 451, sec. 2448, passed May 25, '36.
" Gales' Statutes, 157, sec. 2, approved July 21, '37.

3. The jury are instructed that if they believe from the evidence that the United States of America, by treaty of October 27th, A. D. 1832, greed to grant to Ash-kum two sections of land, to be selected by the President in conformity with the surveys of the public lands by the United States, and to convey the same to him by patent (sec. 7, Stat. at Large, p. 400, art. 3); and that afterwards, on or about the 29th day of March, 1837, in pursuance of said treaty, the President did select frac-

tional section (7) town. 37 north, range 15 east 3d principal meridian, lying south of the Indian boundary line, in Cook County, Illinois, as one of the sections under said treaty; and if the jury further find from the evidence that the said Ash-kum removed to the Indian reservation in the State of Kansas on or about the year 1837, and continued to reside there until his death, and that he died there on or about the year 1846; and if they further believe that the said Ash-kum did not in his lifetime become possessed of and confirmed in the legal
31 estate to said section; and if the jury further believe that at the time of his death said Ash-kum left children and heirs him surviving, and that afterwards, to wit, on the 3d day of November, 1864, the President issued a patent for said fractional section 7 in pursuance of said treaty, conveying said tract of land, with the appurtenances, in fee simple unto said Ash-kum and to his heirs; and if the jury further believe from the evidence that the plaintiffs in this case have purchased the title to the said tract or any part of it from the heirs of Ash kum, then and in that case they have shown sufficient title to entitle them to recover such part thereof or interest therein as the jury find from the evidence to have been purchased by and conveyed to them.

4. The jury are instructed that under the provisions of the 9th, 10th, and 11th sections of the act of the gen'l assembly of the State of Illinois, approved Jan. 31, '27, and of the 1st sec. of the act approved Jan. 22, '29, all deeds of conveyance of real estate lying in Illinois were required to be recorded, and to entitle them to record all deeds were required to be acknowledged before some officer designated in said acts, and when acknowledged before a justice of the peace out of the county in which the lands lay, either in the State or out of the State, having no official seal, such certificate of acknowledgment was required to be accompanied by an official certificate of magistracy by the proper
32 officer under his official seal.

And the jury are further instructed that no deed acknowledged before a justice of the peace, out of the county in which the land lay, unaccompanied by such certificate of magistracy, was entitled to be recorded, and a certified copy of the record of a deed not entitled to be recorded cannot be considered as evidence.

5. If the jury believe from the evidence and the circumstances in evidence connected with this case that the deed a copy of which has been offered in evidence by the defendant was procured by fraud or circumvention, or was forged, they will find for the plaintiff.

Which, after argument, the court refused, but gave the following instead:

This case involves simply the question of where the legal title to this property in controversy vests. It does not involve the question of equitable title, but simply the legal title. The plaintiffs deraign title from Ash-kum by conveyances from his heirs at law to an undivided three-eighths of the land in controversy.

Ash-kum died leaving two children. One of these daughters died childless, but leaving a husband, who took half her interest. The other left two children, who are heirs to the dead mother's share
33 and half their deceased aunt's share. The plaintiffs exhibit deeds, duly executed, conveying to them all the interest of one of these grandchildren, which would be three-eighths.

If no other claim was made to the property the plaintiffs would be entitled to recover this $\frac{3}{8}$ interest. The court has admitted in evidence a certified copy of a deed which was executed by Ash-kum in 1835 to Louis De Salle, conveying the land in question. The counsel has in-

sisted on arguing to you, and I have allowed him to do so, which probably I ought not to have done, the question of fact that this deed was obtained from Ash-kum by fraud. It makes no difference so far as the legal title is concerned whether it was obtained by fraud or not.

If Ash-kum was defrauded or induced to part with this land for nothing he could have applied to the courts to protect him, and had a court of chancery set aside this deed, but a court of law cannot set it aside; therefore, inasmuch as Ash-kum has parted with his title to this property, neither he nor his heirs can recover in this action.

You are therefore directed to return a verdict for the defendant.

34 To which refusal to give the instructions asked and to the giving of the charge above the plaintiffs then and there excepted, and pray the court to allow, sign, and seal this their bill of exceptions, and make the same a part of the record, which is done accordingly.

H. W. BLODGETT. [SEAL.]

(Endorsed:) Filed June 27, 1878. Wm. H. Bradley, cl'k.

And, afterwards, to wit, on the 14th day of October, A. D. 1878, said plaintiff, Daniel H. Elwood, by his attorneys, filed in said clerk's office his bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

Error to the circuit court of the northern district of Illinois.

BENJAMIN S. SOOY AND DANIEL ELWOOD
vs.
PATRICK M. FLANIGAN IMPLEADED WITH EDward Sorin. } Ejectment.

Know all men by these presents that we, Daniel H. Elwood, of Montcalm County, in the State of Michigan, of County, State of and Walter B. Scates, of the county of Cook and State of Illinois, are held and firmly bound unto Patrick M.

35 Flanigan in the sum of five hundred dollars, to be paid to the said Patrick M. Flanigan, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 14th day of October, A. D. 1878.

Whereas, the above bounden Daniel H. Elwood and Benjamin S. Sooy have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the United States circuit court in and for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Daniel H. Elwood and Benjamin S. Sooy shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

DANIEL H. ELWOOD. [SEAL.]
WALTER B. SCATES. [SEAL.]

Approved.

H. W. BLODGETT.

(Endorsed:) Filed Oct. 14, 1878. Wm. H. Bradley, cl'k.

36 United States circuit court, northern district of Illinois.

THURSDAY, *January* 9, *A. D.* 1879.

Present, Hon. Henry W. Blodgett, district judge.

BENJAMIN S. SOOY AND DANIEL H. ELWOOD *vs.* PATRICK FLANIGAN, IMPLEADED WITH EDWARD SORIN. } Ejectment.

Now come the plaintiffs, by Walter B. Scates, esq., their attorney, and move the court to retax the costs herein upon the judgment entered in this cause on the twenty-seventh day of June last, on the ground that the docket fee of twenty dollars, which was taxed in favor of the defendant, was illegally taxed; and it appearing to the court that there have been two jury trials and judgments in said cause, and that a docket fee of twenty dollars was taxed in favor of the defendant upon each trial, in conformity with the rules and practice of the court, it is ordered that said motion be overruled, to which the plantiffs, by their attorney, except.

37 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Benjamin S. Sooy and Daniel H. Elwood are the plaintiffs, and Patrick Flanigan, impleaded with Edward Sorin is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 9th day of January, A. D. 1879, and of our Independence the 103d year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

$21.70.

Received from Daniel H. Elwood the sum of twenty-one dollars and seventy cents, ($21.70), being payment of this transcript and clerk's costs, less five dollars ($5.00) deposit, in the above cause.

WM. H. BRADLEY, *Clerk.*

CHICAGO, *January* 3, 1879.

38 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is before you in said circuit court between Benjamin S. Sooy and Daniel H. Elwood, and Patrick Flanigan, impleaded with Edward Sorin, in an action of ejectment, a manifest error hath happened, to the great damage of the said Daniel H. Elwood, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judg-

ment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1878, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this first day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 102d year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsed:) Supreme Court of the United States. vs. Writ of error.

39 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To Patrick M. Flanigan, impleaded with Edward Sorin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1878, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Benjamin S. Sooy and Daniel H. Elwood are plaintiffs, and Patrick M. Flanigan, impleaded with Edward Sorin, is defendant, to show cause, if any there be, why the error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated this 7th day of January, A. D. 1879.

H. W. BLODGETT, *Judge.*

Service admitted Jan'y 8th, 1879, for the October term, A. D. 1879, of the Supreme Court of the U. S.

PATRICK M. FLANNIGAN,
Defendant.

(Indorsed:) Supreme Court of the United States. Benjamin S. Sooy and Daniel H. Elwood vs. Patrick M. Flanigan, impleaded with Edward Sorin. Citation to October term, A. D. 1878.

(Indorsement on cover:) No. 157. Daniel H. Elwood, plaintiff in error, vs. Patrick M. Flanigan, impleaded with Edward Sorin. N. Illinois, C. C. U. S. Filed 14th January, 1879.

IN THE

Supreme Court of United States,

(No. 157.)

OCTOBER TERM, A. D. 1881.

BENJAMIN S. SOOY AND
DANIEL H. ELWOOD,
Appellants,

vs.

PATRICK M. FLANNIGAN,
Appellee.

APPEAL.

BRIEF AND ARGUMENT FOR APPELLANTS.

W. B. SCATES,

COUNSEL FOR APPELLANTS.

CHICAGO

HORACE O'DONOGHUE, LEGAL PRINTER, PARKER BUILDING, 95-97 WASHINGTON STREET.

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OUTLINE OF THE CASE.

I.

This is an action of ejectment by the grantees of one of the descendants and of the heirs-at-law of Ash-kum, who was a reservee of two sections of land, under the treaty of October 22, 1832, with the Pottawattomies.

1* The declaration is in the usual form.

2 Service of summons had upon the defendant.

3 Plea of general issue.

6 1. On the 22d October, 1832 (see 7 U. S. Stat. at Large, p. 499, Art. 3), the United States made a treaty with a certain band of the Pottawattomie Indians on the Tippecanoe River, in which treaty a reservation was made to Ash-kum, one of the chiefs, of two sections of land to be selected by the President, after the surveys were made.

7 2. On March 29, 1837, the President approved of the selection of fractional section 7, in T. 37 N., R. 15, east of the 3d Principal Meridian, lying south of the Indian boundary line in Cook County, Illinois, containing $465\frac{8}{100}$ acres, as one of the reserved sections.

3. In 1837, under treaty provisions, the United States moved all the Pottawattomies, Ash-kum included, to new reservations in Kansas, where Ash-kum died in 1846, never having returned to Indiana or Illinois after his removal.

8 4. Ash-kum died intestate, on Sugar Creek, Kansas, in 1846, leaving him surviving two daughters, his only children and heirs-at-law.

8 5. One daughter married Wah-sa, and died intestate, without issue, leaving her husband surviving.

* The numbers on the margin refer to page of printed record.

8 6. The other daughter married and had two children,—Ain-wah-sa and Qua-kee—and after the death of her husband she died intestate, leaving her surviving these two children, the only surviving descendants and heirs-at-law of Ash-kum and herself, and the surviving husband of her deceased sister.

7 7. On November 3, 1864, the President issued a patent to Ash-kum and his heirs for said fractional section seven.

8 8. On October 25, 1876, Qua-kee conveyed, by warranty deed, all his interest in said section to Benjamin S. Sooy and Stutley D. Palmer, which deed was duly acknowledged and recorded; and on the 23d day of March, 1877, said Palmer and wife conveyed all their interest in said section to Daniel H. Elwood, which was duly acknowledged and recorded.

8 9. Benjamin S. Sooy, a citizen of the State of Ohio, and Daniel H. Elwood, a citizen of the State of Michigan, bring this action of ejectment as grantees of Qua-kee, one of the heirs of Ash-kum, for an undivided three-eighths of the said section seven.

8 10. It appeared in evidence that Qua-kee had received, as a consideration for his interest, $25 in cash and a note of purchasers for $1,000, to be paid on condition that his title was sustained.

11. Under paragraph three of section one, Revised Statutes of Illinois, 1874, page 417, Wah-sha, husband, would be entitled to two-eighths or one-fourth; and under paragraph one of said section, Ain-wah-sa and Qua-kee to three-eighths each of said section seven, subject to the dower of Ash-kum's widow.

Here plaintiff rested.

II.

PROOF OF LOSS.

1. The appellee, to show title out of plain-
8 tiffs, after making proof of loss of original deed,
the court admitted, over the objection of plaintiffs,
8 oral proof, tending to show that Titus B. Willard,
whose certificate of acknowledgment appeared attached to the certified copy of the deed from Ash-kum to Louis De Seille, was, on October 24, 1835, an *acting* justice of the peace in and for the county of Berrien and Territory of Michigan, and that the witness had seen him so *acting*, holding courts, etc.

2. Thereupon said defendant, in connection with such oral proof, offered in evidence a certified copy
8 of the record of said deed certified by the Recorder of Deeds of Cook County, Illinois. And in connection therewith also offered in evidence certain certificates of magistracy and conformity. And also offered in evidence the statutes of the Territory of Michigan, in force
on the 24th of October, 1835, in reference to
9 acknowledgments, which copy and certificates, and the laws of the Territory of Michigan, are as follows:

Section 2, 1 Territory Laws of Michigan, page 516.

Section 7, 1 Territory Laws of Michigan, page 189.

Published by authority in 1871.

Certified copy of deed is as follows (Book N of deeds, page 353): "Indenture made the twenty-fourth day of "October, in the year of our Lord one thousand eight
"hundred and thirty-five, between Ash-kum, an
9 "Indian chief of the Pottawattomie nation, of the
"first part, and Louis De Seille, of the township of "Niles, in Berrien County, Michigan Territory, of the "second part,

" *Witnesseth:* That the said party of the first part, " and in consideration of the sum of one thousand dollars " to me in hand paid by the party of the second part, the " receipt whereof is hereby confessed and acknowledged, " have granted, bargained, sold, remised, released, aliened " and confirmed, and by these presents do grant, bar- " gain, sell, remise, alien and confirm unto the said party " of the second part, and to his heirs and assigns, for- " ever, the following described tract of land, viz: Sec- " tion seven, town thirty-seven north, range fifteen, east " of the third principal meridian, in the State of Illinois. " Together with all and singular, the hereditaments and " appurtenances thereunto belonging, or in anywise ap- " pertaining, and the reversion or reversions, remainder " and remainders, rents, issues and profits thereof, and " all the estate, right, title, interest, claim or demand " whatsoever of the said party of the first part, either in " law or equity, of, in and to the above bargained prem- " ises, as above described, with the appurtenances and " the hereditaments.

" *To have and to hold* the said premises as above " described, with the appurtenances, unto the said party " of the second part, and to his heirs forever.

" In witness whereof the said party of the first part " hath hereunto set his hand and seal the day and year " first above written.

ASH-KUM. his X mark. [L. S.]

" Signed, sealed and delivered in presence of Titus " B. Willard."

TERRITORY OF MICHIGAN, } ss.
BERRIEN COUNTY. }

Be it remembered, that on the twenty-fourth day of October, A. D. 1835, before me, Titus B. Willard, Esq., one of the justices of the peace for said

county of Berrien, came the above named Ash-kum, an Indian chief, and acknowledged the above written indenture by him subscribed, to be his free act and deed, and desired that the same might be recorded, as such, according to law.

In testimony whereof, I have hereunto set my hand and seal the day and year above written.

TITUS B. WILLARD, [L. S.]
Justice of Peace.

Recorded 31st May, 1836.
RICHARD J. HAMILTON,
Recorder.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

I, Norman T. Gassette, Clerk of the Circuit Court and *ex officio* Recorder in and for said county, in the State aforesaid, do hereby certify that the annexed is a true copy of the record of a certain instrument filed in my office on the 31st day of May, A. D. 1836, and recorded in book N of deeds, on page 353.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said court at Chicago, this 11th day of October, A. D. 1870.

Seal of Circuit Court of Cook County.

NORMAN T. GASSETTE,
Clerk of the Circuit Court, and ex officio Recorder of Cook County.

LOUIS DE SEILLE.

[Five-cent int. revenue stamp.]

STATE OF ILLINOIS, }
COOK COUNTY. } ss. No. 142,955.

I certify this instrument to be filed for record December 31, A. D. 1873; recorded in book 216 of records, page 621, January 8, 1874.

JAMES STEWART,
Recorder.

OFFICE OF COUNTY CLERK, BERRIEN CO., MICH., }
BERRIEN SPRINGS, 187 . }

EDWIN D. COOKE, CLERK.

STATE OF MICHIGAN, }
10 BERRIEN COUNTY. } ss.

I, Edwin D. Cooke, clerk of said *county*, and of the *Circuit Court therein*, the same being a court of record and having a seal, do hereby certify that the certificate of acknowledgment by Ash-kum, an Indian chief, taken before Titus B. Willard, a Justice of the Peace in and for said county of Berrien, on the 24th day of October, A. D. 1835, as appears on the certified copy of the deed hereto annexed, was executed according to and in conformity with the laws of the Territory of Michigan, as they existed at the time of taking such acknowledgment; and I further certify that, as appears by the records of and in the office of the Register of Deeds of said county of Berrien, that the said Titus B. Willard was, at the time of taking such acknowledgment, an *acting* Justice of the Peace in and for said county of Berrien.

Seal of the Circuit Court of Berrien County, Mich. } In testimony whereof I have hereunto set my hand and affixed the seal of said *Circuit Court* at Berrien Springs, this 2d day of January, A. D 1878.

EDWARD D. COOKE, *Clerk*.

STATE OF MICHIGAN, }
OFFICE OF THE SECRETARY OF STATE. } ss.

I, E. D. G. Holden, Secretary of the State of
11 Michigan, do hereby certify that Titus B. Willard was, on the seventh day of March, one thousand eight hundred and thirty-four, *duly appointed* Justice of the Peace for the county of Berrien, as appears from the records in this office, and that the term of office fixed by law at the time of his appointment was three years.

The Great Seal of the State of Michigan.

In testimony whereof I have hereto set my hand and affixed the great seal of the State of Michigan, at Lansing, this the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and seventy-seven.

E. G. D. HOLDEN,
Secretary of State.

By WM. CROSBY, *Dept.*

[All of which evidence was admitted, against the objection of the plaintiffs, and to the admission of which they at the time excepted.]

III.

11 1. Plaintiffs in rebuttal introduced depositions of the widow, son-in-law, and neighbors of Ash-kum, tending to show that at no time from 1832 to the time of his death, Ash-kum had any property except his wigwam, wearing apparel, bedding, cooking utensils, an axe, tomahawk, garden hoe, gun and accoutrements, a saddle, and at one time three ponies, two of which were stolen before he left for Kansas, and that on his way out an Indian gave him a pony.

2. Plaintiffs introduced further evidence, by depositions of his parishioners and neighbors, tending to prove that Father Louis De Seille was a poor missionary Catholic priest, teaching and laboring among these Indians; that he was poor, and had no property other than his personal apparel and priestly vestments, Bible, breviary, bed and sleeping room furniture; never was known to make or seek investments of real estate, and had no known income other then voluntary tithes of his Indian parishioners.

IV.

12 The plaintiffs made the following requests,—which were refused—viz :

1. The jury are instructed that under the treaty of October 27, 1832, the title to section 7, agreed to be selected for and granted by patent to Ash-kum, did not pass from the Government until the patent was issued ; and if the jury believe from the evidence that Ash-kum died before the patent issued, then and in that case the jury are instructed that Ash-kum never was possessed of and confirmed in the legal title or estate to said section in his lifetime.

4 Wheaton, 488, *McArthur* v. *Prowder*.
6 Peters, 261, *McDonald Heirs* v. *Smalley et al.*
6 " 666, *Lindsey et al.* v. *Lessee of Miller*.
7 " 222, *Lampeyreac et al.* v. *U. S.*
12 " 264, *Galloway* v. *Finley et al.*

2. The jury are instructed, that if they believe, from the evidence, that the United States, by treaty of October 27, 1832, agreed to grant to Ash-kum two sections of land, to be selected under the directions of the President of the United States, after the lands should have been surveyed, and the boundaries made to conform to the Government surveys, and to convey the same by patent to said Ash-kum; but that afterwards, on the 29th day of March, 1837, the President of the United States approved the selection, under said treaty, for Ash-kum, of fractional section (7) seven, town (37) thirty-seven north, range (15) fifteen, east of the third principal meridian, lying south and east of the Indian boundary line in Cook County, Illinois, as one of the sections selected under said treaty for said Ash-kum; and if the jury further believe, from the evidence, that the said Ash-kum moved from the State of Indiana on or about the year 1837 to

the Territory of Kansas, under the provisions of treaties, and there remained, having never returned to the States of Indiana or Illinois, and that he died there on or about the year 1846, leaving children and heirs him surviving; and if the jury further believe, from the evidence, that at the time of the death of said Ash-kum, he was not possessed of the legal estate or interest in said section seven (7), nor had ever been, at any time previous to his death, possessed of and confirmed in the legal estate in said section.

And if the jury further believe, from the evidence, that no grant or conveyance by patent had ever been made to said Ash-kum, by the United States, of said section, at any time prior to his death, but that, after his death, to wit, on the 3d day of November, 1864, the President of the United States, in fulfillment of said treaty, did grant and convey, by patent, said fractional section (7) seven to said Ash-kum and his heirs; then, and in that case, any deed or conveyance made by said Ash-kum, in his lifetime, of said tract of land, would be inoperative to convey the legal estate and possession in and to said section, under the provisions of the act of the General Assembly of the State of Illinois (section 7), approved January 31, 1827 (*See Gale's Statutes, p. 149; Revised Statutes 1874, p. 273, § 7*); but the title in fee in such case passed by this patent to the heirs of Ash-kum. (*See Revised Statutes United States, p. 451, § 2448*, passed May 25, 1836; *Gale's Statutes, p. 157, § 2*, approved July 21, 1837.)

3. The jury are instructed, that if they believe, from the evidence, that the United States of America, by treaty of October 27, A. D. 1832, agreed to grant to Ash-kum two sections of land, to be selected by the President, in conformity with the surveys of the public lands by the United States, and to convey the same to him by patent (*Sec. 7, Statutes at Large, page*

400, art. 3); and that afterwards, on or about the 29th day of March, A. D. 1837, in pursuance to said treaty, the President did select the fractional section (7) seven, township (37) thirty-seven, range (15) fifteen, east
13 of the third principal meridian, lying south of the Indian boundary line in Cook County, Illinois, as one of the sections under said treaty; and if the jury further believe, from the evidence, that the said Ash-kum removed to the Indian reservation in the State of Kansas, on or about the year 1837, and continued to reside there until his death, and that he died there on or about the year 1846; and if they further believe that the said Ash-kum did not in his lifetime become possessed of and confirmed in the legal estate to said section; and if the jury further believe, that at the time of his death said Ash-kum left children and heirs him surviving, and that afterwards, to wit, on the third day of November, A. D. 1864, the President issued patent for said fractional section 7, in pursuance of said treaty, conveying said tract of land, with the appurtenances, in fee simple, unto the said Ash-kum and to his heirs; and if the jury further believe, from the evidence, that the plaintiffs in this case have purchased the title to said tract, or any part of it, from the heirs of Ash-kum, then and in that case they have shown sufficient title to entitle them to recover such part thereof or interest therein as the jury find from evidence to have been purchased by and conveyed to them.

13 4. The jury are instructed that, under the provisions of the 9th, 10th and 11th sections of the act of the General Assembly of the State of Illinois, approved January 31, 1827, and of the 1st section of the act approved January 22, 1829, all deeds of conveyance of real estate lying in Illinois were required to be recorded; and to entitle them to record, all deeds were required to be acknowledged before some officer desig-

nated by said acts; and when acknowledged before a justice of the peace out of the county in which the lands lay, either in the State or out of the State, having no official seal, such certificate of acknowledgment was required to be accompanied by an official certificate of magistracy by the proper officer, under his official seal.

And the jury are further instructed that no deed of acknowledgment before a justice of the peace, out of the county in which the land lay, unaccompanied by such certificate of magistracy, was entitled to be recorded, and a certified copy of the record of a deed not recorded, cannot be considered as evidence.

13 5. If the jury believe, from the evidence and the circumstances in evidence, connected with this case, that the deed, a copy of which has been offered in evidence by the defendant, was procured by fraud or circumvention, or was forged, they will find for the plaintiff.

13 Which, after argument, the court refused, but gave the following instructions:

This case involves simply the question of where the legal title to this property in controversy vests. It does not involve the question of equitable title, but simply the legal title. The plaintiffs deraign title from Ash-kum, by conveyances from his heirs-at-law, to an undivided three-eighths of the land in controversy.

Ash-kum died leaving two children. One of these daughters died childless, but leaving a husband, who took half her interest. The other left two children, who were heirs to the dead mother's share and half of their deceased aunt's share. Plaintiffs exhibit deeds duly executed, conveying to them all the interest of one of these grand children, which would be three-eighths. If no other claim

13 was made to the property, the plaintiffs would be entitled to recover this three-eighths interest. The court has admitted in evidence a certified copy of a deed which was executed by Ash-kum in 1835, to Louis De Seille,

conveying the land in question. The counsel has insisted on arguing to you, and I have allowed him
14 to do so, which, probably, I ought not to have done, the question of fact, that this deed was obtained from Ash-kum by fraud. It makes no difference, so far as the legal title is concerned, whether it was obtained by fraud or not. If Ash-kum was defrauded, or induced to part from his land for nothing, he could have applied to the courts to protect him, and had a court of chancery to set aside this deed, but a court of law cannot set it aside. Therefore, inasmuch as Ash-kum has parted with his title to this property, neither he nor his heirs can recover in this action. You are, therefore, directed to return a verdict for the defendant.

To which refusal to give the instructions asked, and the giving of the charge above, the plaintiffs then and there excepted.

Whereupon the jury returned a verdict for the defendant.

Thereupon the plaintiffs moved for a new trial for errors of the court.

1. In admitting improper testimony.

2. Refusing to give instructions asked by plaintiffs ; and

3. In giving the charge aforesaid.

Which motion, upon argument, was overruled, and the plaintiffs then and there excepted to overruling their motion for a new trial.

BRIEF OF POINTS AND AUTHORITIES.

I.

THE COURT ERRED IN ADMITTING IN EVIDENCE A CERTIFIED COPY OF THE DEED.

1. All deeds duly acknowledged are required to be recorded.

Sec. 8, 9, 10, 11, act 1827, Purp. R. E. Stat. p. 476.
Sec. 1, act 1829, Purp. R. E. Stat. p. 486.
Purp. Real Est. Stat., p. 496, §§ 1 and 2; notice 1837.
Purp. Real Est. Stat., p. 497, § 1, conformity act 1841.

2. To entitle a deed to be recorded, it must be acknowledged or proved before an officer authorized to take it.

19 Ill. R. 395, *Adams* v. *Bishop.*
33 Ill. R. 328, *McCormick* v. *Evans.*
36 Ill. R. 372, *Lyon* v. *Kain.*
19 Ill. R. 399, *Montague* v. *Linn.*
2 Scam. R. 209, *McHenry* v. *Ridgely.*
35 Ill. R. 362, *Russell* v. *Rumsey et al.*
40 Ill. R. 530, *St. John* v. *Conger.*
38 Ill. R. 250, *Rose et al* v. *Saunderson.*
10 Mich. R. 419–20, *Harrington* v. *Fish.*
28 Mich. 218–20, *Brown* v. *McCormick.*
28 Mich. 484–88, *Morse* v. *Hewett.*
15 Ill. R. 328, *Buckmaster et al.* v. *Job.*
20 Ill. 14, *Smith* v. *Rankin.*

3. If made before a justice of the peace, out of the county where the lands are situate, or out of the State, there must be *added* to the certificate of acknowledgment, a certificate of magistracy of the proper officer, to entitle it to be recorded.

Sec. 1, act 1829, Purp. R. E. Stat. p. 486.
Sec. 8, 9, 11 and 16, act of 1827, Purp. R. E. Stat. pp. 476–480.
33 Ill. R. 327, *McCormick* v. *Evans.*
3 Ind. R. 203–6–7, *Butterfield* v. *Beale.*
8 Ind. R. 60, *Woods* v. *Polhemus.*

4. No officer is authorized to take an acknowledg ment of a person who is not *personally known* to him as such real grantor, or *proven* to be such by a credible witness; and he shall so state in his certificate of acknowledgment.

Sec. 11, act 1827, Purp. R. E. Stat. p. 476.

Grantor must be *personally* known, and certificate must so state; otherwise it is insufficient

54 Ill. R. 390, *Becker et al.* v. *Quigg.*
19 Ill. R. 313, *Shepherd* v. *Carriel.*
19 Ill. R. 545, *Owen* v. *Robbins et al.*
33 Ill. R. 358, *Moore* v. *Titman.*
39 Ill. R. 91, *Stuart* v. *Dutton.*
54 Ill. R. 380, *Becker et al.* v. *Quigg.*
39 Ill. R. 447, *Tourville* v. *Pierson.*
3 Wallace, 750, *Secrist* v. *Green.*

5. The certificate must contain all the facts necessary, and cannot be aided by parol, and must show that grantor was known.

46 Ill. R. 214, *Emoe* v. *Thompson.*
46 Ill. R. 523, *Lindley* v. *Smith.*
6 McLean R. 200, *Lane* v. *Dolick.*

23 Ill. R. 634, *Gowe* v. *Cather*.
35 Ill. R. 362, *Russell* v. *Rumsey*.
1 Pet. R. 328, *Elliott et al.* v. *Peirsol et al.*
24 Mich. R. 152, *Buell* v. *Irwin*.
6 J. J. Marsh, 532, *Barnett* v. *Shackleford*.
3 Dana, 114, *Nautz* v. *Bailey*.
1 Gilm. R. 147, *Vance* v. *Schuyler*.
2 Cush. 264, *Raymond et al.* v. *Holden*.
5 Gilman R. 125, *Meriner* v. *Saunders*.
12 Mo. R. 545, *McDaniel* v. *Priest*.
15 Ill. R. 328, *Buckmaster et al.* v. *Job*.
5 Mason R. 67, *Manchester* v. *Hough et al.*
1 McLean R. 11, *Elliott et al.* v. *Peirsoll et al.*

6. A deed not acknowledged or approved might be recorded as notice to subsequent purchasers, but could not be read in evidence without proof of its execution.

Act 1827, sec. 19, Purp. R. Est. Stat. 480.
14 Mich. R. 361, *Farmers' and Mechanics' Bank of Michigan* v. *Brunson et al.*

7. The clerk of the county and of the Circuit Court of Berrien County, Mich., is not the proper officer to make a certificate of magistracy, and neither his, nor that of the Secretary of State, certifies that Willard was duly *commissioned or qualified*. The secretary only certifies that he was *appointed*, and the clerk that he was *acting* as such, as appears from the registry of deeds. These certificates could not, therefore, be read in aid of the *original* deed, had it been offered in evidence. Much less are they admissible in aid of a *certified copy* of a deed not entitled to be recorded, for want of the *addition* to the acknowledgment of a full certificate of magistracy to be recorded with it, making complete proof of its execution

matter of record, as required by section one of the act of 1829. Recording it with the simple acknowledgment alone, had only the effect to make it a *notice*, but not a *record*, of a duly executed deed, a copy of which could be read.

Act 1827, §§ 8, 9, 10, 11.
The Ter. Laws of Mich , § 19, art. 5.

I.

Vol. I., Compiled Laws of Michigan, provided that a jutsice of the peace should be commissioned. Not only commissioned, but that he should qualify by filing a bond and oath of office with the clerk of the county court (*§ 1, act of 1805; I. Ter. Laws of Mich., § 39; III. Ter. Laws of Mich., p. 1087; I. Compiled Laws of Mich. (1871), chap. 12, §§ 90, 91*), and a failure to do so vacated the office and appointment.

§ 3, chap. 11, I. Compiled Laws of Mich.

Thus it will be seen that the Territorial Laws of Michigan do not recognize a mere *acting* magistrate, but declare the office vacant, even when *appointed*, as certified by the secretary, or commissioned, in case he neglect to qualify by giving bond and taking a prescribed oath of office; the evidences of which are filed and kept by the clerk of the *county* court, not the clerk of the county and of the circuit court, as certified to in this case. And in case of failure, it is the duty of the clerk of the county court to notify the Governor of the vacancy.

Thus it appears that the clerk of the county court, and not the clerk of the county and of the circuit court, is the officer who, alone, has the official knowledge of the qualified justices of the peace in Michigan. And he alone, under the seal of the county court, could give a full certificate of magistracy, viz: that he was duly commissioned

and qualified at a particular date. And such certificate he could not make in the absence of a bond and oath on file in his office, showing a vacancy. It is, therefore, submitted that there is no official certificate of magistracy offered in this case.

Certificate must state that the justice of the peace was commissioned and qualified.

II.

The court erred in admitting parol evidence to show that Titus B. Willard was *acting* as a justice of the peace. The recording acts of Illinois in force in 1835 (See sec. 1, act 1829, Gale's Stat. p. 155) authorize justices of the peace *only* to take acknowledgments, whose official character could be officially certified as such, under the *seal* of the proper officer authorized and required to keep the records of their qualifications as such. The clerk of the county court, as keeper of the qualifications, could give such a certificate, where the law declared the office vacant, on failing to file the oath and bond required of him. Intrusion into and usurpation of the office of justice does not fall within the necessary spirit or requirements of the recording acts. If so, then an affidavit of a witness that he *acted* as such may be substituted for a certificate of magistracy under seal, required by the recording acts, not only at the trial, as here, but to entitle it to be recorded.

III.

The certificate of conformity is not true in fact. The certificate of acknowledgment is not made in conformity to the laws of the State of Michigan.

This court will judicially notice the laws of the respective States.

The 11th section of the act of 1827 (Purp. R. E. Statutes, p. 476), was in force at the date of this certificate, which provides that no officer should take an acknowledgment of a person, unless he *personally knew* him to be the real party who executed the deed, or was proven to be the real party, by a credible witness known to him, on oath, and that he should state this fact in his certificate.

The laws of Michigan require the same, viz., the certificate must state that the grantor was personally known.

10 Mich. R. 419–20, *Harrington* v. *Fish*.
28 Mich. R. 218, *Brown* v. *McCormick*.
28 Mich. R. 484 *Morse* v. *Hewett*.

This certificate does not certify to that knowledge, or to the sworn information of a credible witness.

2. Again, the laws of Michigan, in cases of acknowledgments by Indians, provide that the officer shall take the acknowledgment through a sworn interpreter acquainted with the language of the tribe of the grantor.

In the case of *Dewey et al.* v. *Campau*, 4 Mich. 565, a notary public swore an interpreter and took the acknowledgment of an Indian grantor, and the court held that the acknowledgment was void, upon the ground that a notary public, under the laws of Michigan, was not authorized to administer an oath.

See 10 Smeed & Marsh R. 46, *Way* v. *Doe*.

The certificate in this case states that Ash-kum, an Indian chief, appeared and acknowledged the deed; but the certificate is silent as to an interpreter; nor does it state that Ash-kum understood the English language, or that Willard, the *acting* justice of the peace, understood the Pottawattomie language. The deed and acknowledgment are both written in English, and a Pottawattomie

Indian, it is claimed, signed it, and acknowledged it as his act and deed, and desired that it might be recorded as such. There is no evidence or statement in the deed itself, or the certificate, that Ash-kum, the reservee in the treaty, was the grantor or real person who did these acts, or, if he was, that he knew what was contained in the paper, or what Willard intended to do. It was not read or explained to him, nor to the Indian that personated him, for the purpose of fixing up this conveyance. The cautious wisdom of these provisions of law, providing against impositions and false personations, applies with more force to these ignorant half savages, than to our own unlettered people. The third article of the ordinance of 1787 protects them, or should do so, from spoliation of their property, without their consent. All the deeds and documents with Indians, that I have seen, contain a full statement of reading and explanations to them, through interpreters. This transaction is wholly silent.

I therefore submit, on this point, that this acknowledgment was made not in conformity to the laws of Michigan, and that the certificate of the clerk of the county and of the Circuit Court, to that effect, is untrue in fact.

IV.

The court erred in refusing to instruct the jury as requested by appellants, and in the charge given by the court, and in refusing a new trial.

1. The title remained in the United States until the patent issued in 1864, and as Ash-kum died in 1846, he never was *possessed* or *confirmed* in the *legal estate*.

Revised Statutes of U. S. p. 451, sec. 2448.
Gale's Statutes, p. 149, sec. 7; p. 157, sec. 7.
Revised Statutes, 1874, p. 273, sec. 7.
4 Wheat. 488, *McArthur* v. *Browder*.

6 Pet. 261, *J. McDonald Heirs* v. *Smalley et al.*
" 666, *Lindsey al al.* v. *Lessee of Miller.*
7 " 222, *Lampeyreac et al.* v. *U. S.*
12 " 264, *Galloway* v. *Finley et al.*

V.

2. Courts of law have concurrent jurisdiction with courts of equity in all cases of fraud, and the court erred in refusing the 5th request of appellants, and in the charge given relative to fraud in procuring the deed.

3 Blackstone, 431.

By sec. 7, of act of 1827 (Purp. R. E. Stat. p. 475), provision was made for the enuring of title, in cases where a grantor sold and conveyed land to which he had no legal title, but afterwards, in his lifetime, acquired the legal title and was confirmed in his possession.

This provision has been ever since, and still is, in full force. (See appendix of acts, " Enuring.")

VI.

The court erred in refusing to give the following request, viz., the fourth instruction set forth in the statement.

VII.

The court erred in refusing the fifth request set forth in statement.

VIII.

The court erred in his charge, and in directing the jury to return a verdict for the defendant, and in refusing a new trial.

ARGUMENT.

I.

The court erred in admitting in evidence the certified copy of a deed purporting to be made by Ash-kum to Louis De Seille, October 24, 1835, as will appear from the following:

(*a.*) All deeds duly acknowledged, affecting title to land, were required to be recorded.

Sec. 8, 9, 10 and 11, act 1827, Purp. R. E. St. 476; Gale's St. p. 150.
Sec. 1, act 1829, Purp. R. E. St. p. 486; Gale's St. p. 155.
Sec. 1 and 2, act 1837, Purp. R. E. St. p. 496; Gale's St. p. 157.
Sec. 1, act 1841, Purp. R. E. St. p. 497.
See appendix, Nos. 5, 7 (1795–1827).

And such deeds took effect from date of filing for record.

Purp. R. Est. Stat. p. 489; sec. 5, act Jan. 13, 1833.
19 Ill. 497, *Merrick* v. *Wallace.*
41 Ill. 233, *Derringer* v. *McConnell.*
41 Ill. 250, *Nattinger* v. *Ware.*

(*b.*) To entitle such deeds to be recorded, they must be acknowledged or proved, as prescribed by the statute, before an officer authorized to take the acknowledgement or proof, and then, and then only, when *so* acknowledged

and recorded, does the record become statutory evidence of execution, whereof a certified copy is admissible in evidence.

See appendix, Nos. 1, 2, 3, 4, 6, 7 and 8 (1795, 1802, 1822, 1807, 1827 and 1829).

16 Ill. 448, *Reed et al.* v. *Kemp.*
19 Ill. 395, *Adams* v. *Bishop.*
33 Ill. 328, *McCormick* v. *Evans.*
40 Ill. 535, *St. John* v. *Conger.*
36 Ill. 372, *Lyon* v. *Kain.*
20 Mich. 384, *Rayner* v. *Lee.*
19 Ill. 399, *Montague* v. *Lynn.*
22 Mich. 252, *Donohue* v. *Klassner.*
2 Scam. R. 209, *McHenry* v. *Ridgely.*
10 Mich. 21, *Hall* v. *Redson et al.*
35 Ill. 362, *Russell* v. *Rumsey et al.*
2 Scam. 315, *Semple* v. *Miles.*
38 Ill. 250, *Rose et al.* v. *Saunderson.*
14 Mich. 361, *Farmers' and Mechan. Bank of Mich.* v. *Bronson et al.*
10 Mich. R. 419–20, *Harrington* v. *Fish.*
24 Mich. R. 152–3–4, *Buell* v. *Irwin.*
28 Mich. R. 218–20, *Brown* v. *McCormick.*
28 Mich. R. 484–8, *Morse* v. *Hewett.*
15 Ill. R. 328, *Buckmaster et al.* v. *Job.*
20 Ill. R. 14, *Smith* v. *Rankin.*
Ancient Deeds—20 Ill. R. 130, *Booth* v. *Cook.*

WHAT THE ACKNOWLEDGMENT MUST STATE.

(*c.*) And the officer must certify in such acknowledgment that the grantor was personally known to him as the grantor. No officer is authorized to take an acknowledgment of a person who is not *personally known* to him as

such real grantor, or *proven* to be such by a credible witness; and he shall so state in his certificate of acknowledgment.

Sec. 11, act 1827, Purp. R. E. St., p. 476; Gale's St. p. 150.
3 Wal. 750, *Secrist* v. *Green.*
54 Ill. 391, *Becker et al.* v. *Quigg.*

In *Reed et al.* v. *Kemp*, 16 Ill. 452, the court say: "Before they (conveyances) are *entitled* to be recorded, "they must be acknowledged or proved as prescribed in "the 16th and 18th sections." [These sections, 16 and 18, are of the revision of 1845, and are identical with section 11 of the Act of 1827—*Purp. Real Est. Stat. 476.*]

The grantor must be *personally* known, and the certificate must so state; otherwise it is insufficient.

54 Ill. R. 390, *Becker* v. *Quigg.*
30 Ill. 103, *Tully* v. *Davis.*
19 Ill. R. 313, *Shepherd* v. *Carriel.*
19 Ill. R. 545, *Goen* v. *Robbins.*
16 Ill. 448, *Reed et al.* v. *Kemp.*
33 Ill. R. 358, *Moore* v. *Titman.*
39 Ill. R. 91, *Stuart* v. *Dutton.*
39 Ill. R. 447, *Tourville* v. *Pierson.*
28 Ill. R. 227, *Short et al.* v. *Conlee.*
46 Ill. R. 523, *Lindley* v. *Smith.*

The certificate of acknowledgment must contain all the facts necessary, and cannot be aided by parol, and must show that the grantor was known.

46 Ill. R. 214, *Emoe* v. *Thompson.*
46 Ill. R. 523, *Lindley* v. *Smith.*
13 Ill. 313, *Shepherd* v. *Carriel.*
6 McLean R. 200, *Lane* v. *Dolick.*
23 Ill. R. 634, *Gowe* v. *Cather.*
35 Ill. R. 362, *Russell* v. *Rumsey.*

2 Scam. 317, *Semple* v. *Miles*.
1 Pet. R. 340, *Elliott et al.* v. *Peirsoll et al.*
6 J. J. Marsh, 532, *Barnett* v. *Shackleford*.
39 Ill. 421, *Bowman* v. *Wettig*.
3 Dana, 114, *Nantz* v. *Bailey*.
1 Gilm. 147, etc., *Vance* v. *Schuyler*.
15 Ill. 328, *Buckmaster et al.* v. *Job*.
5 Gilman R. 125, *Mariner* v. *Saunders*.
5 Mason, p. 67, *Manchester* v. *Hough et al.*
1 McLean R. 11.

In the case of *Lindley* v. *Smith*, 46 Ill. 527, the court say: "The statute is explicit, that in order to convey "property in real estate the grantor shall appear before a "proper officer, to whom he or she is known, or is proved "by a credible witness to be the person who executed "such deed or conveyance. And the officer is required "to endorse or annex a certificate to the deed, stating that "such person was personally known to him, or proved by a "witness who shall be named, to be the person who sub-"scribed the deed. This requirement has been held to be "one of substance, and, *in its absence, the deed is not admis-"sible in evidence. Tully* v. *Davis*, 30 Ill. 103; *Shepherd* v. "*Carriel*, 19 Ill. 313; *Adams* v. *Bishop*, Ib. 395; *Montague* "v. *Linn*, Ib. 399. In the case of *Tully* v. *Davis*, we "said that where the word 'known' was omitted in the "certificate, it was fatally defective. * * * When "it is fatally defective, the deed is regarded as inopera-"tive. * * * And in the case of *Lyon* v. *Kain*, 36 "Ill. 362, it was held, that under this act the officer taking "the acknowledgment must certify that the grantor was "known or proved to be the person who is the grantor "in the deed. A deed cannot be said to have been "acknowledged until it appears that it was the grantor "himself, and not some person who may have personated

" him, who was before the officer and made the acknowl-
" edgment. This provision is wise and salutary in its
" operation. If no such requirement existed, forgeries
" would be easily perpetrated, and it would be hard in all
" cases, and impossible in many, to prove the fact. Re-
" move this safeguard, and titles to real estate would be
" held of a slender and brittle tenure. We come next to
" the consideration of the question whether the defect in
" the acknowledgment could be explained by the parol
" evidence of the justice who certified it."

This the court decides in the negative, and decides that no parol evidence can be admitted to supply the defect of the certificate. " The acknowledgment cannot " rest partly in writing and partly in parol. * * * " If that were admitted it would present the anomalous " case of supplying defects in a solemn written certificate, " which purports and is presumed to contain all the facts " which occurred at the time, to be overthrown by the " frail memory of witness. Again, if such evidence " might be received to supply defects, we should for the " same reason be compelled to permit the officer or other " person to contradict the acknowledgment by the same " kind of evidence, and thus defeat a title acquired in good " faith, and conforming to all the requirements of the " law."

In the case at bar, in the court below, oral testimony was admitted to prove what can be proved only by an official certificate under seal, namely, that Willard was a justice of the peace. His being a justice of the peace must be proven by a certificate of the proper officer, *under his seal*. And oral testimony should have been excluded. Our recording laws, from 1795, by Congress, up to present date, all require that every act by an officer in relation to the proof of execution of deeds in lieu of the common law proof of execution, must be under seal. Parol testimony (that of Wheeler) should not have been

admitted. He should not have been allowed to testify that he saw Willard acting as justice, holding court, etc.

(*e.*) If acknowledgment is made before a justice of the peace out of the county where the land is situated, or out of the State, to entitle the deed to record, there must be *added* to the deed an official certificate of acknowledgment, by the proper officer, under seal, as to the magistracy of the justice of the peace taking the acknowledgment.

Sec. 1, act 1829, Purp. R. E. St. 486.
Sec. 8, 9, 10 and 16, act 1827, Purp. R. E. St. 476–80.
33 Ill. R. 327, *McCormick* v. *Evans.*
3 Ind. R. 203–6–7, *Butterfield* v. *Beall.*
13 Ill. 313, *Shepherd* v. *Carriel.*

(*f.*) Recording a deed without such authentication gave such deed effect only as a *notice* to subsequent purchasers, but not as a conveyance or evidence of title. Such an original deed could not be read in evidence without an additional certificate of magistracy as to the officer taking it, and a certificate of conformity in case the substance and form of the acknowledgment did not comply with the requirements of the State statute.

Sec. 1, act Feb. 26, 1841, Purp. R. E. St. p. 497.
See Appendix, No. 9, 1837.

In *McCormick* v. *Evans*, 33 Ill. 330, the court say: "The contract might be recorded without any acknowledg-"ment or proof of record whatever, but a certified copy of "the record was not evidence until the instrument was "acknowledged or proven as the the law requires."

But these supplemental proofs of execution on a trial do not apply to aid the recording so as to make the *record itself*, or a *copy of it*, evidence of its due and full

execution, nor can such additional certificates of magistracy and conformity mend or remedy the defective record of a deed not entitled to record. (See authorities under *b*.)

On these points, I observe :

1. As between the parties, deeds are valid without acknowledgment or recording ; but as to creditors, subsequent purchasers and incumbrancers, they take effect from the filing for record. (See appendix.) But the execution of unacknowledged deeds must be proved at the trial, as at common law.

2. Where statutory proof of execution by acknowledgment is relied upon, it must be in writing, and must show full compliance, in form and substance, with the requirements of the statutes, and the writing must be authenticated by an official seal. If the officer taking the acknowledgment has a seal, he must use it. If he have no seal, his official character must be authenticated under the seal of the proper officer who keeps the record of his commission and qualifications.

3. All officers authorized under acts 1827 and 1829 (and these acts were in force when this deed purports to have been made) to take acknowledgments, had official seals, except justices of the peace, and the official characters of justices were required to be authenticated, under seal, by an official certificate of magistracy. (See appendix, 8.) Without this latter certificate there was only half proof of execution, and the deed could not be read in evidence ; but when this half proof was offered, with the *original* deed, on trial, the defect could be supplied by a certificate of magistracy. And again, when the certificate of acknowledgment out of the State failed to set forth the essential facts required to be stated, this defect could be cured by a certificate, under seal, of a proper officer, that the acknowledgment was in conformity

to the laws of the State where it was taken. (See appendix, No. 4, 10.) But this certificate of conformity could not be received as evidence of the official character of the justice of the peace. Both certificates were required where no certificate of magistracy was *added* to the certificate of acknowledgment, and where the acknowledgment did not set forth the facts prescribed by the statute. (See appendix, No. 2–7–8.)

Thus a party must make proof of execution at common law; or if he seeks to substitute statutory proof he must bring himself within its provisions by compliance with its requirements.

Neither the certificate of acknowledgment, nor the certificates of magistracy and conformity, can be partly in writing and partly by parol. All must be in writing, and the latter two under seal.

The certificate of magistracy offered in this case is not admissible, for the following reasons:

1. It is made by the "clerk of the county and of the Circuit Court" of Berrien County.

2. It certifies to what appears upon the records of the *Register of Deeds* as evidence of the official character of the justice of the peace.

3. The laws of Michigan provide for the election of a register of deeds, who is the legal custodian of the registry, and not the "clerk of the county and of the Circuit Court."

3 Terr. Laws Mich, p. 136, §§ 4 and 5.

4. The laws of Michigan provide for a county court, and a clerk of said court, and such clerk is the custodian of the oaths and bonds which justices of the peace are required to give and file with the clerk before they can act as justices. The clerk of the county court, as custodian of the files of qualifications, can alone give a certificate of magistracy.

3 Terr. Laws Mich. p. 1087.

The " clerk of the county and of the Circuit Court of Berrien County," Michigan, is not the proper officer to make a certificate of magistracy; and neither his certificate nor that of the Secretary of State certifies that Titus B. Willard was duly *commissioned* or *qualified* as a justice of the peace. The secretary only certifies that he was *appointed*, and the clerk that it appears from the Registry of Deeds that he was *acting* as such. These certificates could not, therefore, be read in aid of the original deed, had it been offered in evidence, much less are they admissible in aid of a *certified copy* of a deed not entitled to be recorded for want of the addition to the acknowledgment of a full certificate of magistracy to be recorded with it, making complete proof of its execution a matter of record, as required by section 1 of the act of 1829. Recording it with the simple acknowledgment alone had only an effect to make it a notice, but not a record of a duly executed deed, a copy of which could be read in evidence.

The territorial laws of Michigan provided that all officers under the Constitution, including justices of the peace, should be commissioned, and not only commissioned, but that justices of the peace should qualify by filing a bond and oath of office with the clerk of the County Court, and a failure to do so vacated the office and appointment.

Thus it will be seen that the territorial laws of Michigan do not recognize a mere *acting* magistrate, but declare the office vacant, even after appointment, as certified to by the secretary, or commissioned, in case he neglects to qualify by giving bond and taking a prescribed oath of office, the evidences of which are filed and kept by the clerk of the County Court, and not the clerk of the Circuit Court, who certifies in this case. And in case of failure to qualify, it is the duty of the clerk of the County Court to notify the Governor of the vacancy.

It thus appears that the clerk of the County Court is the officer who alone has the official knowledge of the qualified justices of the peace in Michigan, and he alone, under the seal of the County Court, could give a full certificate of magistracy, namely, that he was duly commissioned and qualified at a particular date, and he could not make such a certificate in the absence of a bond and oath on file in his office.

It is, therefore, submitted that there is no official certificate of magistracy offered in this case.

The certificate must state that the justice of the peace was commissioned and qualified. This was not done.

(*h.*) The certificate of conformity offered in this case is not conclusive, but only *prima facie* evidence, and I object to it because it is not true in fact, in the following particulars, viz :

1. The laws of Michigan, as well as the laws of Illinois, require the officer to certify that the grantor is *personally* known, if not, he must take and certify the sworn evidence of a credible witness to grantor's identity. This acknowledgment is not in conformity with these laws.

10 Mich. R. 419–20, *Harring* v. *Fish.*
28 Mich. R. 218, *Brown* v *McCormick.*
28 Mich. R. 484, *Morse* v. *Hewett.*

2. Where an Indian's acknowledgment is taken, the laws of Michigan require a sworn interpreter.

4. Mich. R. 565, *Dewey et al.* v. *Campau.*

In the case of *Dewey et al.* v. *Campau*, 4 Mich. R. 565 (decided under the act of 1838, sec. 11, Rev. Stat. 1838), a notary public swore an Indian interpreter and took the acknowledgment of an Indian grantor. The court held

that the acknowledgment was void, upon the ground that a notary public, under the laws of Michigan, was not authorized to administer an oath. (See 10 Sneed & Marsh R. 46, *Way* v. *Doe*.)

This acknowledgment is not conformable with this requirement of a sworn interpreter. Nor does it appear that the deed was ever read or explained to Ash-kum, or that he ever signed it. Nor is it shown that he was the Indian that acknowledged it; nor if he did, that he knew what the deed contained, or what the acknowledgment applied to or meant. When a deed is written in the English language, for execution by one of another nationality,—French, German, Spanish, Italian, Russian, Indian, or other foreigner—it should be affirmatively shown by one claiming under it, that the grantor understood the English language, and could read English writing, and had read the deed; or, that a competent interpreter, who understood both languages, had been sworn, and had made known and explained to the grantor the contents and provisions of the deed.

Much more should these precautions and necessary safeguards be required to be shown in case of deeds of wild, half-savage and illiterate Indians, on the eve of leaving their homes and hunting grounds for a distant frontier. The Government always treated with them through interpreters, and had done so with Ash-kum and his band, for this very reservation, only three years before the date of this pretended deed. In all the deeds and depositions of Indians coming under my observation, and there have been many such, there has always been an interpreter used in each case, and the manner of the transaction fully shown by affidavits and certificates accompanying. Nothing of this kind is shown in this case.

If the *original* deed were produced in evidence, these certificates of magistracy and conformity would not be

receivable, or sufficient proof of its execution. Much less are they competent or sufficient to establish the existence of record evidence of title for the introduction of a *copy* as evidence, or to prove the execution of a deed by Ash-kum.

The clerk of the Circuit Court certified to conformity. The statute and decisions show it *not* in conformity. It appears by the records of Register of Deeds, that Willard was *acting* justice of the peace. The Secretary of State merely certifies to the *appointment* of Willard. It does not appear that he ever qualified by taking oath, or giving bond, in which case the appointment was vacated, as already shown.

The defendant offers a certified copy from records of Recorder of Deeds of Cook County, and in support of it, offers a certificate of E. D. Cooke, Clerk of Berrien County, Michigan, and of the Circuit Court of said county, being a court of record, that the certificate of acknowledgment of Titus B. Willard, justice of the peace of said county, taken before him on 24th October, 1835, as appears on said certified copy, was *executed* according to and in conformity with the laws of the Territory of Michigan as they existed at that day.

(*2d par. sec. 20, Rev. Stat. Ill., 1877* (*Hurd's*), *p. 275*, certificate of clerk that the deed was *executed* and *acknowledged* in conformity with laws of the State or Territory.)

This certificate does not state that the deed was *executed* in conformity with the law, but only that the *acknowledgment* was in conformity to the law.

A certified copy of a recorded deed cannot be read in evidence unless the deed was properly acknowledged and certified to be *entitled* to be recorded.

33 Ill. 327, *McCormick* v. *Evans*.

The officer taking the acknowledgment must be authorized under the statute and qualified to act by the laws of the State where the acknowledgment is taken.

19 Ill. 395, *Adams* v. *Bishop*.
33 Ill. 328, *McCormick* v. *Evans*.
36 Ill. 372, *Lyon* v. *Kain*.

And the certificate of magistracy must state that the justice of the peace was duly commissioned and qualified as such at the time of taking the acknowledgment.

4 Scam. 457, *Morrison* v. *Hinton*.

To entitle a deed acknowledged out of the State to be recorded, there must be a certificate of magistracy or conformity added to it.

10 Mich. 419–20, *Harrington* v. *Fisk*.

And a certificate of acknowledgment must show that the grantor was personally known to the magistrate, and unless so acknowledged, the deed is not entitled to be recorded, and a registry thereof is not evidence.

24 Mich. 152–3–4, *Buell* v. *Irwin*.

In 28 Mich. 218–20, *Brown* v. *McCormick*, it was held that only deeds properly acknowledged according to the statute, are entitled to be recorded; but that under the curative act of 1861, the record may operate as notice, but not as evidence. Held, further, that the certificate of acknowledgment must show that the grantor was personally known.

The 28 Mich. 484–88, *Morse* v. *Hewett*, fully sustains the general principles laid down in the above case of *Brown* v. *McCormick*, as to the acknowledgment of deeds in order to entitle them to be recorded.

QUALIFICATION OF JUSTICES.

By the statutes of Michigan, justices of the peace are required to qualify for office, by filing an oath and official bond with the clerk of the county court, in the manner and within the time prescribed by law, and a failure or refusal to do so vacated his office.

Compiled Laws of Mich., p. 63, section 17.

In 22 Michigan R. 252, *Donohoe* v. *Klassner*, it was held that certificate of clerk of county is not sufficient; he must certify that he is clerk of a court of record, and such certificate is not cured by healing act of 1861.

In 24 Mich. R. 152–4, *Buell et al.* v. *Irwin*, it was held: That a commissioner to take acknowledgments of deeds must authenticate his acknowledgments of deeds in another State, under seal, and cannot be cured by healing act of 1861; and being so defective, cannot be recorded, and is not evidence, not being entitled to record. Acknowledgment must show that grantor was *personally* known.

Brown v. *McCormick*, 28 Mich. R. 218 to 222. Same in substance as last above.

In *Dewey et al.* v. *Campau*, 4. Mich. R. 565, held: That in deed by Indian husband and wife both should acknowledge the deed.

Certificate that she "stated," is void.

Wife's acknowledgment must be taken separately. Held that where acknowledging officer is unacquainted with grantor's vernacular language the acknowledgment must be taken through a sworn interpreter.

II.

VALID AND VOID DEEDS.

If a contract or deed is inoperative or void, and can not be enforced at the death of the grantor, the lands descend to the heirs.

1 McLean, 50, *McKay* v. *Carrington*.

An entry in the name of, or a conveyance to a dead person, is a nullity.

6 Pet. 261, *McDonald's Heirs* v. *Smalley*.

A patent to a dead person conveys no title.

12 Pet. 264, *Galloway* v. *Finlay*.

But such a patent may, under certain circumstances, enure to the heirs of the deceased person under the acts of 1807 and 1836. *Ubi supra*, and

4 McLean, 181, *Schessa* v. *Sawyer*.

6 McLean, 562, } *Forsyth* v. *Ballance*.
13 How. 18, }

2 Wall. 605, *Hogan* v. *Page*.

21 How. 228, *French* v. *Spencer*.

Under the statute of 1827 (*Purple's Real Estate Statutes, p. 475, section 7*), where a grantor conveys land to which he has no legal title, if the grantor afterwards acquires the legal title, and becomes possessed and confirmed in the legal estate of the land, such subsequently acquired title will enure to the grantee. This statutory provision has continued in force to the present time. (See *Revised Statutes of 1874, p. 273, § 7.*) This statutory rule is a rule of property within the jurisdiction of the State, and leaves no room or jurisdic-

tion in the United States to provide a different rule, as has been done in the act of 1836. Congress has no power to change or alter the rule provided by a State statute.

A deed to public lands, while the title remains in the United States, conveys no title unless sanctioned by an act of Congress.

21 How. 294, *Morehouse* v. *Phelps*.

A grantor can only pass what title he has at the time of conveyance, hence a grantee acquires nothing under a void grant.

7 Pet. 222, *Lampeyreac* v. *U. S.*

Respectfully submitted,

W. B. SCATES,

Counsel for Appellants.

APPENDIX.

RECORDING LAWS.

No. 1 1795 — By act of August 1, 1795, all deeds, etc., affecting lands thall be acknowledged or proven before one of the judges of the General Court, or one of the justices of the Common Pleas, and recorded, etc.

Sec. 8, act 1795, Purple's Real Estate Stat. p. 452.

No. 2 1802 — By act of January 20, 1802 (*Sec. 1, Purple's R. Est. Stat. p. 457*), it is provided that deeds executed and acknowledged in conformity with the laws of the country where made, shall be deemed duly proven, and may be recorded in this Territory.

Sec. 2. * * No deed, etc., acknowledged or proven out of this Territory, shall be admitted to record unless accompanied with a certificate annexed of some clerk or prothonotary of a court of record, or a notary public of the county, State or country in which such acknowledgment was taken, or proof made under the seal of the court or office that the same was taken before a competent authority according to the laws of the country where taken.

No. 3 1807 — Act of 1807 (*Sec. 8, Purple's R. Est. Stat. p. 460*), that all deeds, etc., made in the territory, shall be acknowledged or proven and recorded.

Sec. 2. * * * And deeds executed out of the State and acknowledged before a mayor of a city, under seal, shall be as valid as if acknowledged before an officer of the Territory.

No. 4 1822 By act Dec. 30, 1822 (*Sec. 1, Purple's R. Est. Stat. p. 465*), all deeds, etc., executed in conformity to laws, where made out of this State, declared good and entitled to record as if executed according to the laws of this State.

Sec. 2.—Ibidem—All deeds, etc., heretofore made and acknowledged in conformity of country where made and recorded, declared good.

No. 5 1825 Act of 1825 (*Sec. 1, Purple's R. Est. Stat. p. 471*) required all deeds to be recorded.

ALL DEEDS, ETC., MUST BE RECORDED.

No. 6 1827 The act of Jan. 31, 1827 (*Sec. 15, Purple's R. Est. Stat. p. 480*), provides that all deeds, etc., concerning lands shall be recorded.

WHAT NECESSARY TO ENTITLE DEEDS TO RECORD—HOW AUTHENTICATED TO BE ENTITLED TO RECORD.

No. 7 1827 The act of January 31, 1827, sec. 9, Purple's R. Est. Stat. p. 476, provides that, "In order to entitle any of the before enumerated writings to be recorded," they shall "be acknowledged by the party or parties executing the same," before a judge of the Supreme or Circuit Court, under seal; or before a justice of the peace of the county where the land is situated; or, out of the State, before a judge of the Supreme or District Court of the United States, or Superior Court of the United States or Territories; or before any clerk of any court of record in any of the United States or their Territories, certified under seal of the court.

Sec. 10, Id. p. 476, provides that acknowledgments out of the United States may be taken before the mayor or chief officer of any city, under the seal of the city or chief officer, and shall be of like force and validity as if acknowledged under sec. 9 above, and shall be entitled to be recorded.

WHAT CERTIFICATE OF ACKNOWLEDGMENT MUST STATE

Sec. 11 provides that no judge or other officer shall take the acknowledgment of any person unless he is personally known to him to be the real person who and in whose name such acknowledgment is proposed to be made, or shall be proved to be such by a credible witness, and shall so state in his certificate, giving the name of such witness.

WHEN COPY OF RECORD IS ADMISSIBLE IN EVIDENCE.

Section 17, act of January 31, 1827 (*Purple's R. Est. Stat. p. 480*), provides that every deed, etc., " which, by
" virtue of this act, shall be *required* or *entitled to*
No. 7 " *be recorded*, as aforesaid, being acknowledged or
1827 " proved according to the provisions of this act,
" may be read in evidence without further proof of
" its execution, and, if lost, or not in the power of the
" party wishing to use it, a transcript of the record
" thereof, certified by the recorder in whose office the
" same may be recorded, may be read in evidence in any
" court in this State without further proof thereof."

The above is fully supported by *Moore et al.* v. *Hunter et al.*, 1 Gil. R., 331; *Cook* v. *Hall*, 1 Gil. R., 575; *Buckmaster et al.* v. *Reed*, 4 Scam. R. 117; *Deringer et al.* v. *McConnell*, 41 Ill. 230, 231; *Nattinger* v. *Ware*, 41 Ill. 245–249; *St. John* v. *Couger*, 40 Ill. 536–7.

Sec. 20 of act of March 29, 1872, as amended by sec. 1 of act of July 27, 1874 (*2 Adams & Durham's R. E. Stat. p. 1619, paragraph 2*), requires a certificate of magistracy as well as a certificate of conformity; or if it shall so appear by the laws of the State, then duly proved and certified copies of such record may be read in evidence. Held, in *Shepherd* v. *Carriel*, 19 Ill. 313, that it was not sufficient for the clerk to say that he is " clerk of the county " and attest by the " seal of the county." It should be the seal of the court.

Sec. 20, Id. p. 130, required that the officer must personally know the parties, or take sworn proof of their identity from a credible witness known to him, and must so certify.

Sec. 35, Id. p. 145, provides that deeds duly acknowledged or proven may be read in evidence, whether recorded or not, and if lost, etc., certified copies of the record may be read; but the original must have been duly acknowledged or proven as required by the statute, and recorded, to entitle a copy to be read. See *Reed et al.* v. *Kemp*, 16 Ill. 452; *King* v. *Gibson, Admr.*, 32 Ill. 349.

No. 8 1829

The act of January 22, 1829, sec. 1 (*Purple's R. Est. Stat. 486*), added to the list of officers authorized to take acknowledgments under the act of 1827, "Commissioners to take acknowledgments of deeds," "Notary Public," "Justices of the Peace;" and the section further provided, that "If such justice of the peace "resides out of this State, *there shall be added to the deed* "a certificate of the proper clerk, setting forth that the "person before whom such proof or acknowledgment was "made, was a justice of the peace at the time of making "the same;" and if the justice resided in the State, in another county from where the land lay, then a like certificate of the clerk of the County Commissioners' Court, under his seal of office.

DEEDS TAKE EFFECT FROM DATE OF FILING.

No. 9 1833

By the act of 1833 (*Purple's R. Est. Stat., sec. 5, p. 489*), deeds take effect from the filing for record.

Merrick v. *Wallace*, 19 Ill. 497.

The case of *Derringer et al.* v. *McConnell*, 41 Ill. 233, further held that a retrospective effect will not be given to a statute, unless compelled by its language; and further, the Legislature has no power to transfer one

man's land to another. See, also, *Nattinger* v. *Ware*, 41 Ill. 350. In this case the court construe the act of 1833, which provided that deeds should take effect from the date of filing for record, and the act of 1837, which made the recording of an unacknowledged deed a notice to subsequent purchasers and incumbrancers.

RECORDING UNACKNOWLEDGED DEEDS OPERATES AS NOTICE.

No. 10 1837 By the act of July 21, 1837 (*Purple's R. Est. Stat. p. 496*), the recording of an unacknowledged deed is made notice to purchasers and creditors, whether recorded before or after this act; but provides that no such deed shall be read in evidence unless "acknowledged or proven in conformity with the laws of "the State, *to entitle the same to be recorded;*" or proof be made of its execution.

No. 11 1841 Sec. 1, act of Feb. 26, 1841 (*Purple's R. Est. Stat. p. 497*, repealed by Rev. L., 1845, p. 467), provides that all deeds, etc., which have been or may hereafter be executed out of this State, and within the United States, and acknowledged or proven in conformity with the law of the State where made, shall be recorded; and all such deeds, etc., are delared valid, as if made and acknowledged in pursuance of the laws of this State; provided a clerk of a court of record, under his hand and seal of court, shall certify that the same was done in conformity with the laws of the State where so acknowledged; and all deeds, etc., heretofore recorded, are declared to be good and effectual.

Construed in *Buckmaster et al.* v. *Job*, 15 Ill. 328; *Booth* v. *Cook*, 20 Ill. 129, Apl. 1858. Act was only in-

tended to give such deeds operation as notice, and not as records of title to make copies evidence.

4 Scam. 117, *McConnell* v. *Reed*.
1 Gil. R. 302, *Wiley* v. *Bean*.
19 Ill. 486, *Merrick* v. *Wallace*.
41 Ill. 245, *Nattinger* v. *Ware*.
16 Ill. R. 448, *Reed et al.* v. *Kemp*.

Recording of a deed not entitled to be recorded is not notice.

St. John v. *Conger*, 40 Ill. 535.

WHAT NECESSARY TO ENTITLE DEEDS TO RECORD.

Chap. 24, Rev. Stat. 1843, §§ 16 to 20 (*1 Adams & Durham's R. Est. Stat. pp. 124 to 132*), provides that, "*Before deeds*, etc., *shall be entitled to record*," they shall be acknowledged or proved as follows, viz.: When made and acknowledged out of the State and within the United States, provided any clerk of a court of record shall certify, under his hand and seal of the court, that the deed was executed and acknowledged, or proven in conformity with the laws of the State where made.

No. 12 1845

Session Acts 1847, p. 37, § 1, provides, that "All "deeds and conveyances which have been or may be "acknowledged or proven in the manner pre- "scribed in this section, shall be entitled to record, "and be deemed as good and valid in law, in "every respect, as if the same had been acknowl- "edged or proved in the same manner prescribed in the "sixteenth section of the twenty-fourth chapter of the "revised laws to which this act is an amendment.

No. 13 1847

Section 3. "That deeds, mortgages, conveyances, "powers of attorney, or other writings of or concerning "lands or real estate situated within this State, which have

" [been] or may hereafter be executed without this State " and within the United States, and which have been or " may hereafter be acknowledged or proved in conformity " with the laws of the State, territory or district in which " they were executed, shall be admitted to record in the " county or counties wherein the lands or real estate " affected are situated, and such deeds, mortgages, con- " veyances, powers of attorney or other writings acknowl- " edged or proved, as aforesaid, when so recorded, may " be used as evidence without further proof of the execu- " tion thereof."

Act approved February 22, 1847.

WHEN ADMISSIBLE AS EVIDENCE.

No. 14 1872 1874 Sec. 20 of act of March 29, 1872, as amended by Sec. 1 of act of March 27, 1874 (*2 Adams & Durham's R. E. Stat. p. 1619, paragraph 2*),

requires a certificate of magistracy as well as a certificate of conformity; or if it shall so appear by the laws of the State, then duly proved and certified copies of such record may be read in evidence. Held, in *Shepherd* v. *Carriel*, 19 Ill. 313, that it was not sufficient for the clerk to say that he is " clerk of the county," and attest by the " seal of the county." It should be the seal of the court.

Sec. 20, Id. p. 130, required that the officer must personally know the parties, or take sworn proof of their identity from a credible witness known to him, and must so certify.

Sec. 35, Id. p. 145, provides that deeds duly acknowledged or proven may be read in evidence, whether recorded or not, and if lost, etc., certified copies of record

may be read; but the original must have been duly acknowledged or proven as required by the statute, and recorded, to entitle a copy to be read.

Reed et al. v. *Kemp*, 16 Ill. 452.
King v. *Gibson, Admr.* 32 Ill. 349.

Recording of a deed not entitled to be recorded is only notice, and not evidence of execution.

St. John v. *Conger*, 40 Ill. 535.
Cook v. *Hall*, 1 Gil. 575.
Buckmaster et al. v. *Reed*, 4 Scam. 117.
Derringer et al. v. *McConnell*, 41 Ill. 230–231.
Nattinger v. *Ware*, 41 Ill. 245–249.
Moore et al. v. *Hunter et al.* 1 Gil. 331.

LAWS OF MICHIGAN TERRITORY.

No. 16 1815 — A county court established in 1815 (*Secs. 1, 4 and 5, 1 Territorial Laws, p. 184.*

No. 16 — Clerk shall take oath (*Id. p. 185, Sec. 5–6.*

1820 — Clerk shall take oath and give bond (*Id. page 716, Sec. 9, Act 1820.*

No. 17 1805 — Justice of the Peace, before he takes his office, must take an oath (*Id. p. 6 and 7, Act 1805*).

No. 18 1827 — By act of April 12, 1827, 2 Ter. Laws Mich. 361, sections 2, 6 and 7, conveyances are required to be acknowledged, or proved and certified, and recorded; otherwise they are fraudulent as against subsequent purchasers for value. They must be *entitled* to be recorded before record; and then, and then only, they may be read in evidence, or copy admitted.

Revised Laws Michigan, p. 260, Sec. 20.

No. 19 1833 By act of April 20, 1833, (*Sec. 39, 3 Terri. Laws, p. 1087*) all justices of the peace now in office and those hereafter appointed shall take an oath and give bonds as therein prescribed, and file the same with the clerk of the county court.

No. 20 1839 All deeds were required to be recorded, but a certificate of magistracy was necessary to entitle a deed to record *as in Illinois* (*2 Compil. Laws Mich. p. 1358, Act of 1839*), and it must state that the justice of the peace was duly commissioned and qualified.

No. 21 1840 By act of 1839, Sec. 43 (*Revised Stat. Mich. 1846, p. 267*) the certificate of magistracy was required to be recorded at large with the deed, and by Sec. 31, (*Id. p. 266*) act of 1840, copies of deeds so authenticated and recorded were admissible in evidence. If recorded without such authentication they operated only as notice under the curative act of 1861.

Brown v. McCormick, 28 Mich. R. 215.

ENURING TITLES.

No. 22 1827 By sec. 7, act of January 31, 1827, Purple's R. Est. Stat. p. 474, if any person shall sell and convey to another by deed or conveyance purporting to convey estate in fee simple absolute in any tract of land or real estate lying and being in this State, not then being possessor of the legal estate or interest therein at the time of the sale and conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the land or real estate so sold and conveyed, it shall be taken and held to be in trust, and for the use of the grantee or vendee, and the convey-

ance aforesaid shall be held and taken, and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance.

32 Ill., 348, *King* v. *Gilson*.
33 Ill., 331, *Gachenour* v. *Mowry*.
Lex Loci, 10 Wheaton, 192, *McCormick et al.* v. *Sullivan et al.*
1 Howard, 311, *Bronson* v. *Kinzie et al.*
3 Wallace, 750, *Secrist* v. *Green*.
8 Wallace, 513, *Carpenter* v. *Dexter*.
9 Wallace, 23, *McGoom* v. *Scales*.

ADVERSE POSSESSION.

No. 23 1827 By sec. 4, act of January 31, 1827, Purple's R. Est. Stat. p. 474, any one out of the possession of lands, tenements and hereditaments, and notwithstanding there may be adverse possession thereof, may sell, convey and transfer all his interest in and to the same in like manner as if he were in actual possession of the lands intended to be conveyed, and his grantee shall have the same right for the recovery thereof, and shall in every way be entitled to the same advantages, as if the grantor at the time of the execution of the instrument had been in actual possession.

SUPREME COURT U. S.
FILED
NOV 19 1881
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1881.

DANIEL H. ELWOOD,
Plaintiff in Error,

vs.

PATRICK M. FLANAGAN, IMPLEADED WITH EDWARD SORIN,
Defendants in Error.

BRIEF OF DEFENDANTS.

THOMAS HOYNE,
For Defendants in Error.

CHICAGO:
PRESS OF BEACH, BARNARD & CO., LEGAL PRINTERS, NO. 104 RANDOLPH STREET.
1881.

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PATRICK M. FLANAGAN, IMPLEADED WITH EDWARD SORIN,
Defendants in Error,
ads.

DANIEL H. ELWOOD,
Plaintiff in Error.

BRIEF OF DEFENDANTS.

The defendants in error were sued in the Circuit Court of the United States, for the Northern District of Illinois, in ejectment, to recover an undivided three-eighths interest in a piece or parcel of land which is a portion of fractional section 7, township 37, east of 3d P. M, south of the Indian boundary line, in Cook county, Illinois.

The case was tried by a jury before Hon. H. W. Blodgett, district judge, in January, 1878, and a verdict found for the defendants.

The court overruled a motion made by plaintiff in error for a new trial on the merits; but the plaintiffs, under the

statute of Illinois being entitled to take a new trial on payment of all costs, came in, on the 20th day of April, 1878, and took their motion for another trial under the statute.

On the 27th day of June, 1878, the case was a *second time tried* by a jury, before Judge Blodgett, and again a jury rendered a second verdict against the plaintiffs in error in this case.

We beg leave of the court to present as preliminary to the law argument of the case a connected history of the title to section seven, observing that each side of the case claims to have derived their title from the same common source.

Fractional Section Seven (7), Town 37 N., R. 15, East of 3d P. M., situate in Cook county, Illinois, was selected under a grant reserved or made by treaty entered into with the Pottawatomie chiefs and warriors of Indian tribes of Indiana, Michigan and Illinois, at Tippecanoe, by the United States, in the year 1832. (7th Vol. U. S. Statutes at large, 399, 403.)

In the 3d article of that treaty, provision was made, and certain grants of land were reserved for the use of the several chiefs whose names are given in that treaty, by which the United States agreed to convey to them by patent the land so reserved, when selected and approved by the President of the United States.

Among the chiefs named was one "*Ash-Kum*," a chief of a tribe residing in Michigan, to whom was reserved two sections of the public land to be so selected.

The Record, page 7, shows that the plaintiffs proved on the trial that the selection and approval of said section 7, was made in March, 1837, and that in November, 1864, the President of the United States, Abraham Lincoln,

issued the government patent, which has since been held by defendants in error to confirm the title held by them, under a deed of conveyance made in the year 1835, by Ash-Kum, the chief, to one Louis De Seilles, from whom the defendants derived their title. A copy of the patent is printed in the record (at page 7), and was offered in evidence by the plaintiff in error to sustain their own title upon the trial below.

The patent makes special reference by proper recitals to the provisions of the treaty of 1832; and shows the approval of the President of the United States, of the selection made by the chief, "*Ash-Kum*," of said fractional section 7, town 37, as stated.

Thus it will be found, that the treaty of 1832, created an *equitable interest* in the land to be selected under it; and that the reservation, according to the judicial rulings of this court, in the cases of *Crews* v. *Buchan*, 1 Black, 352, and *Doe et al.* v. *Wilson*, 23 How., 458, became a subject of sale and conveyance by the chief or reservee, "*Ash-Kum*," before any patent was issued.

It will be found, also, on reference to the act of congress of May 30, 1836, (cited in the cases referred to above) that it is provided "That in all cases where patents "of public lands have been, or may thereafter be, issued "in pursuance of any law of the United States, to a per- "son who had died, or who shall thereafter die, before the "date of such patent, that the title of the land desig- "nated therein shall *inure to and become vested in the* "*heirs, or devisees or assigns* of such deceased patentee "the same as if the patent had issued to such deceased "person during his life."

Title of Defendants in Error.

Now, it is under these express and irreversable sanctions of law, and the well considered rulings of this tribunal; that defendants in error in this case, now hold, and have held, their title. They derive this title from a conveyance made by the Indian chief Ashkum, the reservee, of the treaty of 1832, executed in 1835. It has been upheld by both the Circuit and District Court judges in the United States Courts at Chicago. The defendants, therefore, as will be seen, claim by title *prior in point of time as well as of right*, to the plaintiff's deed of 1877; and the plaintiff himself brings into this court the record, which establishes the foundation and source of defendants' title. So recently as 1877, the year in which this suit was commenced in the court below by the plaintiffs, it will appear (on page 8 of record), that the plaintiffs purchased their claim of title of one of three pretended grandchildren, the heirs of the deceased chief, Ash-kum, in Kansas, and that one of these was induced to make a conveyance of this land, (before deeded to Louis DeSeillas, in 1835,) to the grantors of plaintiff, Benjamin Sooy and Studley D. Palmer.

In this connection we ask the Court to note the fact, that the only payment made to these pretended heirs was *twenty-five dollars in cash*, together *with a promissory note of $1,000!* Payable only when the purchasers succeeded in establishing the title to property so purchased and deeded!

In other words, the plaintiffs purchased a "law suit" to institute a litigation at their own expense, on a wager, that if they won, they would then pay a note of one thousand dollars to the child or heir of Ash-kum, and in that case, perhaps, those heirs would appear to have

parted with a property worth tens of thousands of dollars for a consideration of one thousand! And in that case, the bad faith of having set aside a former conveyance of the same property to a *bona fide* purchaser by their ancestor in 1835, (forty-two years before), for an actual consideration, would have given a fraudulent character to the entire transaction.

We forbear any comment of our own on the fraudulent character of this purchase. Its terms were "champertous" at common law. The courts of Illinois have held that when one agrees with another, to aid him in the enforcement of a claim, and to prosecute a suit, when if successful he was to receive one-half of what he might recover, and he was to pay all costs if he failed, fell within the very definition of "champerty," the most *odious species* of *maintenance.*

Champerty being "*malum in se*," and an offense at common law, it seems clear, the court say: "upon princi-"ple that a court of equity will not enforce a contract "which is champertous." See:

Gilbert v. *Holmes*, 64 Ills., 548.
Norton v. *Tuttle*, 60 Ills., 136.

THE ELDER TITLE OF DEFENDANTS AND THE PRIOR CONVEYANCE OF 1835 MADE BY "ASH-KUM," THE GOVERNMENT RESERVEE.

We now take up the elder title or conveyance, made by the ancestor of the alleged grandchildren, who in 1835, sold and bargained the section to Louis De Seilles, from whom the title of defendants is derived.

The consideration is expressed in the deed, and Louis De Seilles, *paid at the time*, ONE THOUSAND DOLLARS. He

had long been and was at the time of the conveyance a christian missionary, a French emigrant, and Catholic priest, who, like so many of his faith and country in the early settlements of the West, had lived among the Indian tribes, laboring for their conversion to christianity. In 1837 these tribes were removed farther west, by the United States, beyond the Mississippi. Louis De Seilles for the time remained behind. He continued the pious work of his former years, but singularly enough, he died in the same year—1837—soon after the government removed these red children, the Indians, from their former homes in Illinois, Indiana and Michigan. And here, they had been the pupils, converts and friends of the good father.

The result, however, of his missionary labors in that land, which was then a wilderness, the remote habitation of only the aboriginal inhabitants, with the barbarous customs of Indian life, that in giving way to the higher life and civilization of the races who have succeeded, the scene of these, his early labors, has been crowned with two of the most highly reputed institutions of learning in all that region. The Catholic missionary could have no family to inherit the land which he planted, and so he left no last will or testament, but upon his death, this property descended upon his next of kin in Belgium, as legal heirs. A brother, sister, and some nephews and nieces, the surviving children of a former brother, deceased, who survived him. Some of these have so far recognized the claims of the mission, which their pious kinsman had sacrificed his life to promote, that voluntarily they have divested themselves of the interest, making of it a *free will offering*, to advance the same pious work. The others have been induced, upon very moderate pecuniary compensation, to sell and convey their interest to the same end. And the eminent

and learned divine now in charge of the great religious community which has succeeded to the humble mission of 1835, to-day finds himself also at the head of the two great universities of "Notre Dame," and "St. Mary's of "the Lake." The Rev. Edward Sorin, though not served with process in this suit, was impleaded as a defendant, and defends in the interest of the institutions over which he has for many years exercised a careful and successful supervision, as principal.

I.

The legal title of Plaintiffs in Error.

In the record of plaintiffs' case (p. 8), they introduce the Treaty of 1832, as the basis of their title, and next the United States Patent of 1864, issued to and held by defendants. The patent, at page 7, is transcribed in full, and makes all the usual citations of the treaty, &c., while it shows the selection of section 7, which, as we show, Ash-kum conveyed by his deed, executed in 1835. It is shown by plaintiff, that Ash-kum died in Kansas, in the year 1846, leaving to survive him, two daughters. One of these children died childless, with a husband who survived her. He would have inherited by our Illinois statute of descents, *one-half* her interest, or *one-quarter* undivided interest of the whole section; the other half or quarter falling to the surviving sister. This sister, it is said, left surviving her, *two* children, who were the grandchildren of the chief, "Ash-kum," who therefore would succeed to the half interest of the *mother*, and the *one-fourth* of their *aunt's interest*; that is, they would have inherited an undivided three-fourths share of their grandfather's

estate, had it not been conveyed, as defendants claim, by the deed to DeSeilles, in 1835.

And then plaintiffs introduce their deed, made as is pretended, by one of the above specified grandchildren (Quakee), on the 25th October, 1876, to Studley D. Palmer and Benjamin Sooy; that is, the deed conveyed a $\frac{3}{8}$th interest, if any interest existed, and this is again divided by Studley D. Palmer, conveying his undivided half interest to the plaintiff, Daniel H. Elwood, (see p. 8), who is joined with Sooy as plaintiff in this suit.

On cross-examination of *Quakee* (page 8), it appeared that Studley D. Palmer and Daniel H. Elwood purchased of Quakee his title to Section 7. Upon paying therefor *$25, cash*, and giving her a note for *$1,000*, to be paid only in the event that Palmer & Elwood obtained the land, but if *Palmer & Elzwood* should not be *successful in this suit then nothing should be paid on the note.*" (See page 8.)

II.

The legal or adverse title of defendants.

The defense rely upon a deed of conveyance set out in full at page 9 of Record, made by the Indian Chief Ash-Kum on the 24th day of October, 1835, in the Territory of Michigan, to Louis de Salle (Seilles) for a consideration of one thousand dollars, the receipt of which is thereby acknowledged.

This deed was acknowledged on same day (24th day of October, 1835) before a justice of the peace of the county of Berrien, Territory of Michigan, his name being, "*Titus B. Willard*"! and, by certificate attached to same record, made by the recorder of Cook county,

Illinois, it appears that the original of the deed, of which the one introduced in evidence is a copy, was recorded in the county of Cook (Chicago) on the 31st day of May, 1836, in book N of deeds, at page 353. It will be understood that this was the recorder's office of the county in which the land was situate.

It was proved that the records of Cook county having been destroyed by the *Chicago fire of 1871*, and that the original deed, after due and diligent search, could not be found, a copy of the deed above referred to, certified as such copy by said recorder, was admitted in evidence, and to this *copy* and *deed*, nearly all the points made on the part of plaintiff in the court below were addressed—for this court?

III.

The objections to defendants' title.

The plaintiff's counsel made two principal objections to the copy of the original deed as offered, which were overruled by the court.

(1.) That the certificate of acknowledgment as appended to original deed was defective because "it did not "appear that *Ash-Kum*, the grantor, was *personally known* "to him, the justice, to be the *same person* who had "signed the deed."

(*a.*) The answer to the objection appears in the certificate itself, which does state, "that on the 24th day of "October, 1835, the above named *Ash-Kum* came before "him (the justice) and acknowledged the above written "indenture by him subscribed, to be his free act and deed, "and that he desired the same might be recorded as such "according to law."

(*b.*) A second answer to the objection made, is, that the law of the Territory of Michigan in force at the time did not require the acknowledging officer to do more than he did in this case.

Laws of Territory of Michigan, 1818–21, pp. 156–57–58.

Sec. 2, of that law, only requires, "that any deed or "conveyance shall be acknowledged by the party or par- "ties executing the same; or *proved* by one or more of "the subscribing witnesses thereto, before one of the "judges of the Supreme Court or before one of the justi- "ces of any County Court, a notary public, or any justice "of the peace, in any county within this Territory, and a "certificate of such acknowledgment or proof being in- "dorsed thereon, and signed by the person before whom "the same was taken, such deed or conveyance shall be "recorded," &c., &c., &c.

In *Brown* v. *McCormick*, 28 Mich., 218, objection was made to the form of the acknowledgment in that case because the certificate did not show that the grantor was *personally* known to the acknowledging officer.

The court in that case say: "that the certificate upon "its face clearly implied, that *the grantor was personally* "*known to the justice.*"

The point of the objection here, (the court say) is, not that the supposed certificate was upon its face wanting in something to stamp it, as a *certificate*, but it is upon the construction due to it, if considered as a certificate. Whether in truth the terms used import that the grantor was personally known to the justice.

"Suppose," the court say, "that the original deed had "not been lost, and it could have been produced, the cer-

"tificate was no less effective in authorizing the record of "the deed as notice, than if it had been recorded with a "more formal certificate. Proof could then be made of the "actual execution and delivery, the same, as in other "cases where proof of an instrument is requisite." And they say, that the general statute which regulates alienation by deed in Michigan, very clearly implies that the acknowledgment is not one of the constituent facts of the conveyance proper. "A deed, with a defective certificate, "may operate as a *notice* of the rights secured by the "deed—where the instrument was made in good faith "and intended to operate as a conveyance."

IV.

(2.) The other objections.

The plaintiff also made the other objection, that at the time of the recording of the deed of 1835, in Cook County, Illinois, there was no certificate of *conformity*, and none of *magistracy*, as required by the laws of Illinois.

To obviate these objections, the court will find at page 10 of this Record, *two certificates* appended to this copy of the deed. One of these is made by the Secretary of State of Michigan, and the other is made by the clerk of the Circuit Court of Berrien County in Michigan, and both of them dated in December, 1877, and January, 1878.

The clerk of the Circuit Court, Edwin D. Cook, certifies, that the certificate of acknowledgment, by Ash-Kum, taken before Titus Willard, a justice of the peace in Berrien county, on the 24th day of October, 1835, as it appears on the certified copy of the deed (which is the

same referred to) hereto annexed, was executed according to and in conformity with the laws of the Territory of Michigan, as they existed at the time of taking such acknowledgment; And further, the certificates states, that as appears by the records of and in the office of register of deeds of said county of Berrien, that the officer *Titus B. Willard* was at *the time of taking such acknowledgment*, an acting justice of the peace, in and for the said county of Berrien.

The second certificate made by the Secretary of State of Michigan, certifies that *Titus B. Willard*, on the 7th day of March, 1834, was duly appointed justice of the peace of the county of Berrien, as appears from the records in his office, and that the term of office fixed by law, at the time of his appointment *was three years*, to which is attached the great seal of the State of Michigan, and signed by the secretary. (Page 11 of printed Record.)

To the same purport proof was introduced, by parol, showing that said *Titus B. Willard was, in October, 1835*, the date of the acknowledgment, seen to be *acting as justice of the peace*, in and for said county of Berrien, and that the witness had seen him so acting, in holding courts, &c. (See page 8 of Record.)

Upon the above proof made by the two certificates, and the parol testimony that the Justice Willard was, at the time he took said acknowledgment, *actually in office*, and acting as such; the certified copy of the deed and acknowledgment made in 1835 was admitted as evidence of the original conveyance which had been lost or destroyed.

WAS THE DEED ENTITLED TO RECORD?

The counsel also say, that the original deed of defendants, unaccompanied with the certificate of magistracy and conformity, never was entitled to be recorded under the laws of Illinois, and that a certified copy of such a deed, so recorded cannot be CERTIFIED AS A COPY to be used in evidence.

The express rulings of the Supreme Court of Illinois in several cases will summarily dispose of the last objection.

1st. The case of "*Dunlap* v. *Daugherty*, 20 Ills., 397," was a case where a clerk of a court of record of another State certified that the acknowledgment to *a copy* of a recorded deed was when it was taken *in conformity* with the law of the State where taken — and the person who took the acknowledgment *was then* a justice of the peace.

The court hold that, although this certificate of conformity bears date in *1855*, and the acknowledgment was taken in *1821*, it was a compliance with the statute, to produce the certificate of 1855.

The court in that case say, that the clerk certifies that the certified copy is acknowledged in conformity with the laws of Connecticut, in force at the date of the original deed, * * * * * * * * * * * *

and if the copy of the certificate of the justice to the copy of the deed was *in conformity with* the laws of Connecticut when it was made, it follows that the *original certificate* must have been in conformity. They perceive no error in admitting such copy with the certificate of conformity.

Another case, later in date, *Bowman* v. *Wettig*, 39 Ills., 416 and 424. Justice BREESE cites the statutes of Illinois of 1822, 1847, and 1851, which govern the entire subject. The act of 1851 provides that a certified copy of any deed, &c., affecting any real estate within this State, made by a clerk of a court of record of the State where such deed was acknowledged, and which has been recorded within the proper county of this State, shall be evidence in all courts and places; *provided*, that the party offering such certified copy in evidence will exhibit with the same a certificate of conformity, as provided for in the 16th section of chapter 24 of the Revised Statutes — notwithstanding such certificate of conformity has never been recorded.

Scates' Comp., 972.

This provision of section 16 has been continued in subsequent revisals (see Revised Statutes of Illinois, 1874, p. 276, section 20 of chapter 30), and provides "that certified copies of the record of such deed, mortgage or "other instrument in writing relating to real estate heretofore or hereafter made, and recorded in the proper "county, may be read in evidence, as in other cases of "such certified copies, upon such a certificate of conformity to the laws of the State, territory or district "where such deeds were made and acknowledged, being "exhibited therewith, or annexed thereto."

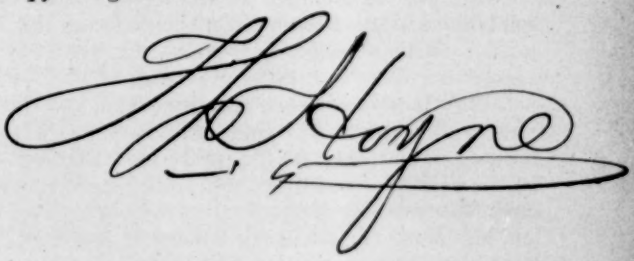
Revised Stat. of Ills. of 1874, p. 276.

It is difficult to conceive that more than this statute of Illinois and the decisions of her Supreme Court, can or could be more conclusive as to the admissibility of the evidence which the defendants offered in support of the deed introduced as before stated.

In addition to all which, is the authority of the two

judges of the United States Courts. Applying the local law of the State according to the well understood construction placed upon local statutes, Judge Blodgett admitted the deed upon both the trials before him. And we also attach a copy of another opinion rendered by Judge Drummond upholding the deed of 1835. In a recent suit for dower, brought in the name of Ash-Kum's widow, in 1877, and in the interest of the same persons, who appear as plaintiffs in this case, but which was decided in July last by Judge Drummond, the U. S. Circuit Judge.

As the most conclusive and intelligent argument, which, as counsel, I can offer, in closing this case for defendants, I beg leave to transcribe this opinion of Judge Drummond entire. It contains a summary of the same facts as to the title which appear on the record. It refers to the former decisions of this court; and finally, disposes of the objections made to the *certified copy of the deed* made by *Ash-Kum* to De Seilles in 1835, holding that under the *twentieth* section of the Illinois statute, relating to conveyances, (which I have already cited) the *copy of the deed was properly admissible in evidence.* And that the certificates of magistracy and conformity were sufficient to make that deed *and copy* a legal record.



Opinion of Judge Drummond.

Circuit Court of the United States—Northern District of Illinois.

Pka-o-wah-ash-kum, *v.* Edward Sorin, *et als.* } *Bill for Dower.*

Opinion delivered July, 1881.

Drummond, J.:

This was a bill filed on the 7th day of April, 1877, for the assignment of dower in fractional section 7, T. 37 N., R. 15, E. in Cook county, Illinois. The plaintiff is an Indian woman of the Pottawatomie tribe, at present a resident of Kansas, and claims dower as the wife of Ash-kum, an Indian chief, to whom two sections of land were granted by a treaty made on the Tippecanoe river on the 27th of October, 1832, one of which was the section already referred to.

By the third article of the treaty "the United States "agreed to grant to each of the following persons the "quantity of land annexed to their names, which land "shall be conveyed to them by patent." Among the names mentioned is that of Ash-kum, and the quantity annexed to his name is two sections. After describing the list of persons, and the quantity of land agreed to be granted by the United States, the article closes with the following words: "The foregoing reservation shall be selected "under the direction of the President of the United States "after the lands shall have been surveyed, and the boundar-"ies to correspond with the public survey." The land was selected under this treaty, and the selection approved by the president in March, 1837. A patent was not issued until November, 3, 1864, and then it issued to Ash-kum and his heirs. At the time it issued, Ash-kum was dead, but there has been an act of Congress, long in force, which declares that a patent issued to a dead person shall take effect as though he were living. There have been two decisions of the Supreme Court of the United States,

one of which cases went up from this court, under this treaty, which have declared what was the nature of the estate taken by Ash-kum under this treaty. *Doe* v. *Wilson*, 23 How., 457, and *Crews* v. *Burcham*, 1 Black, 352. Those cases decided that there was an estate conveyed to the reservee capable of being transferred by deed even before the land was selected or surveyed; that when selected and surveyed, and the patent issued, the patent operated so as to transfer by its terms a title to any one to whom the title had been legally conveyed by the original reservee. In *Doe* v. *Wilson*, the reservee died before any patent was issued, and long before the patent had issued the reservee, during his life, had made a conveyance by general warranty deed of the lands granted to him by the treaty; and the court decided that the person holding the grant under the reservee acquired a title by the issuing of the patent as against his heirs; and of course, that the heirs of the reservee, as against the grant of their ancestor, acquired no title whatever, notwithstanding the issuing of the patent to him and his heirs. Substantially the same facts existed in the case of *Crews* v. *Burcham*, where the court made the same ruling.

Ash-kum on the 4th of October, 1835, made a conveyance of the section in controversy in this case to Louis De Seille by a warranty deed, a certified copy of which from the Recorder's office of Cook county has been introduced in evidence, it not being in the power of the parties to produce the original deed. Two objections have been made to the introduction of this copy; first, that it was not properly acknowledged; and secondly, that there was no certificate of magistracy. According to the copy, the deed was acknowledged in Berrien county, Michigan, before a justice of the peace. The official charter of the justice of the peace is shown by a certificate of the Secretary of State of Michigan, under the seal of the State, attached to the copy; and the certificate of a clerk of a court of record also attached, showing that the acknowledgment was made in conformity with the law of Michigan at the time the acknowledgment was taken; and independent of such certificate, I suppose it would be the duty of this court to determine whether or not it was so executed and acknowledged. I think the copy is properly

admissible under the 20th section of the statute relating to conveyances; *and therefore*, that the evidence is that Ash-kum made a conveyance of his right and title to this section of land in 1835, and consequently that when the patent was issued to him and his heirs, it conveyed to his grantee and his assigns under the deed of 1835, all his title to the section, and that his heirs cannot set up any claim to the land as against the deed of their ancestor.

There have been several deeds introduced on the part of the defense to show that the plaintiff has conveyed her interest in the land to different persons who were claiming the land and in possession under the title obtained from Ash-kum, and therefore, she cannot now set up any claim for dower. One of these deeds is dated February 19, 1877, by which she conveys, in consideration of the sum of $2,000, with covenants of warranty to Benjamin S. Sooy, Stutely D. Palmer, James W. Murphy and D. O. Elwood, the tract of land in controversy, together with the other section reserved to Ash-kum by the treaty; and there is a deed of July 5, 1877, in which the plaintiff purports to convey for a consideration of $150, all her interest in this land to Sorin, one of the defendants, making express reference to the bill filed in this case, and authorizing and directing the grantee to cause this bill to be dismissed. These conveyances thus made by the plaintiff are attacked as not having been made by her with full knowledge of the facts; and it is claimed that she was not aware of what she was signing, and, therefore, that the conveyances are inoperative. The proof shows that she was not able to write nor to speak English; that all communications to her in English had to be made through an interpreter. The proof is of such a character that if the case had to rest upon the validity of these deeds, there would be some difficulty in sustaining them, because it does not appear very clearly, although there is a good deal of evidence tending to that conclusion, that she did fully understand the purport and effect of the papers that she signed. I do not, therefore, think it necessary to place the decision of the court in this case upon these deeds, but rather upon other grounds.

The proof seems to show that she was married to

Ash-kum by a Catholic priest as early as 1834. There is also proof showing that she and Ash-kum lived together as man and wife after their removal to Kansas, where he died in 1846. Under the law of this State at the death of her husband, she became endowable of his interest in this section of land, she not having been a party to the deed which her husband made in 1835. The agreement to grant had been made by the United States; the land had been located and surveyed and the boundaries had been established at the time of the death of her husband. It is true the patent had not issued, but still her husband, if he had never made any grant of the land, would have been clothed with every right except what might be conveyed by the issue of the patent to him, and she was also clothed with the inchoate right of dower, which became perfect on his death. There has been possession admitted and payment of taxes by several of the defendants, under the grant from Ash-kum, and a general appropriation of the land for more than seven years prior to the filing of this bill; but it is claimed by the counsel of the plaintiff, although he has put in proof to show that the plaintiff was naturalized as a citizen by the District Court of the United States in Kansas, on the 13th of October, 1869, that she being an Indian woman is not subject to the general rules applicable to ordinary citizens; that she is clothed with special immunities in consequence of her tribal relations, she still being a member of the Pottawattomie tribe of Indians; and consequently all those laws which are applicable to the cases of possession of land, do not reach her case.

There is an expression used in the opinion of the Supreme Court in *Crews* v. *Burcham*, already referred to, which might, perhaps, throw some doubt upon the question made by the plaintiff in this case. That language is, "It "is true that no title to the particular land in question "could vest in the reservee or in his grantee, until the lo- "cation by the president, and *perhaps* the issuing of the "patent." It seems to me the doubt implied by the use of this language can hardly be considered as entitled to much consideration in such a case as this, where the defendants claim not through another and independent title, but through the title granted by the treaty, and through

the reservee named in the treaty, so that there was nothing to make the title complete in the reservee or his assignee except the mere issuing of the patent. Under our law, for the purpose of asserting a right to the land, an action of ejectment, or of trespass, or any other action to enforce a right which existed, was maintainable; and the issue of the patent was the mere consummation of a technical right, and nothing more. It was analogous to the common case under our law of a tract of land purchased of the United States, and the money paid, and possession taken by the purchaser, under a receipt of the receiver of the land office, or a certificate of the register, and after this has taken place, a patent issues to him. In such case, the purchaser has always been considered, even before the issue of the patent, as clothed with all the material rights of ownership to the land. And in the case supposed, where the patent issued to him, no one else can question his prior right. It is only where there is a title independent of his in which a patent may issue to some third party for the same land, that any question can arise.

Some stress has been laid upon the fact that the plaintiff was ignorant of the tracts of land which had been selected for her husband, and of her husband's rights to this particular property, as well as of the issuing of the patent, until years after his death. I do not think this argument can be considered conclusive as against those who were in the actual possession of the land, holding under a title from her husband himself. It cannot be maintained that after a perfect title to land exists within this State by a grant to an Indian, he is exempt, or the land is exempt from all the ordinary burdens and incidents which the law of the State imposes upon the owners of lands. He must assert his rights against a trespasser, or a person in possession under color of title, the same as any other person. The cases which have been cited by the counsel for the plaintiff, where land belonging to the Indian tribes has been held not to be taxable under the law of the States, have no application to this case. Here the land was severed from the mass of public lands by the grant, the selection of the president, and the issuing of the patent, and the United States could make no claim that the land be-

longed to an Indian tribe, or to a member of an Indian tribe, as such, and I think the plaintiff has lost as to the land thus in possession of the defendants, all right to the maintenance of this bill for dower, by the delay in the application. More than thirty years elapsed between the death of her husband and the filing of this bill. Thirteen years elapsed between the issuing of the patent and the filing of the bill. During all this time, or the greater part of it, some of this property has been held adversely under a grant from her husband. That in a case of an application for dower on the part of the widow, in lands held by her husband during coverture, the law of the State on limitations applies, as settled by several cases.

Owen v. *Peacock*, 38 Ill., 33.
Steele v. *Gellatly*, 41 Ill., 39.
Whitney v. *Nichol*, 46 Ill., 230.
Gilbert v. *Reynolds*, 51 Ill., 513.

The only question, therefore, is whether because she is a Pottawatomie woman, she is exempt from the operation of the general rules applicable in such cases; and whether any special disability attaches to her social and political status? I think not, and therefore I shall dismiss the bill as to those defendants thus in possession.

In giving this opinion, I do not wish to be understood as deciding that some of the other defenses made in this case may not be valid; but I prefer to place the decision on the ground of the laches of the plaintiff. It is difficult, for instance, to believe, in view of her husband's connection with the treaty of Tippecanoe, he himself being one of the signers of that treaty, and the fact that he made a conveyance of this tract of land long before he left Indiana and went to Kansas, this claim was entirely unknown to his wife; but, however that may be, it seems to me that when the title was conveyed by the government, she must be placed in the same condition as any other person, and for the consequences of her acts and her non-action, where the rights of third parties are concerned, she has no special immunity.

Counsel for Compl't: Hon. Walter B. Scates.

For Defense: Messrs. Thomas Hoyne; F. W. Young; Leaming & Thompson; Hitchcock, Dupee & Judah.

14-570

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 170.

GEORGE A. DAVIS & COMPANY ET. AL., APPELLANTS,

vs.

L. FRIEDLANDER, JULIUS STICH, AND L. LITHAUER, PARTNERS AS FRIEDLANDER, STICH & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED MARCH 14, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 170.

GEORGE A. DAVIS & COMPANY ET. AL., APPELLANTS,

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L. FRIEDLANDER, JULIUS STICH, AND L. LITHAUER, PARTNERS AS FRIEDLANDER, STICH & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

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1 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov'r term, A. D. 1877, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 23rd day of Jan'y, A. D. 1878, in the following cause, to wit:

FRIEDLANDER, STICH & CO., PLAINTIFF,
vs.
GEORGE A. DAVIS & CO. ET ALS., DEFENDANT'. } No. 303. Eq.

2 Proceedings had in the district court of the United States for the 6th circuit and district of West Tennessee, in a cause herein below entitled, at a regular term of said court, to wit, its November term, A. D. 1872, begun and holden in the Federal court-rooms, No. 450 Main street, in the city of Memphis, in the said district, before the honorable Connally F. Trigg, United States district judge for said district, present and presiding.

Petition.—Filed Aug. 20th, 1870.

FRIEDLANDER, STICH & CO.
vs.
GEORGE A. DAVIS & CO. ET ALS. } 477.

3 Petition in re; L. Kaufman, bankrupt.

To the Hon. Connally F. Trigg, judge of the district court for the district of West Tennessee, sitting in bankruptcy.

Your petitioners, L. Friedlander, J. Stich, & L. Lithauer, citizens of the city & State of New York, copartners trading under the name and style of Friedlander, Stich & Co., respectfully represent unto your honor that they are creditors of L. Kaufman, a bankrupt. That on the 30th day of November, 1866, said L. Kaufman, of the city of Memphis, Tennessee, being indebted to them in the sum of $18,000.00, due by account for goods, wares, and merchandise by them sold to the said Kaufman previous thereto, they sued out an attachment against said L. Kaufman for said sum. Petitioners state that said attachment was
4 duly issued upon a proper affidavit and bond by John Creighton, esq'r, then an acting justice of the peace for Shelby Co., Tennessee, and placed in the hands of P. M. Winters, the sheriff of said county, who on the same day, to wit, the 30th day of November, 1866, executed said writ of attachment by levying on the following real estate of the said L. Kaufman, lying in said Shelby County (there being no personal property of the said Kaufman to be found by said sheriff in said county), to wit, lots No. 10 and 11, on the north side of St. Charles street, each lot fronting on said street 60 feet and running back in parallel lines 148½ feet to an alley, as designated on Rucker's and Person's subdivision of grounds for Mrs. Conley. Also, part of lot 4 in block 35 (No. 34 in Todd's & Crider's map of the city of Memphis) in the town
5 of Fort Pickering, said lot lying on the north side of Carolina st.,

237½ feet west of the intersection of Carolina and Eighth streets, and fronts [southwardly] *westwardly* on said Carolina st. 130 feet, and running back northwardly between parallel lines 170 feet. Also nine (9) acres and forty-one hundredths ($\frac{41}{100}$) of an acre, part of what is known as the Rayland tract, beginning at the N. E. intersection of Grove avenue with Robison st.; thence north with Robinson street 1,236 feet to a stake, within fifty feet of the centre of the Memphis and Charleston Railroad; thence south 45° east with said railroad, 559½ ft. to Rayland st., 840 ft. to Grove avenue; thence with the north line of Grove avenue 394 ft.
6 to the beginning. And also the lots situated in said city and county, beginning at a point on the west side of Orleans st., 100 feet south of the intersection of the west side of Orleans street with the south side of a 20-foot alley, which lies 177 feet south of Vance street; running thence southwardly with the west side of Orleans st. 131 feet to a stake; thence westwardly, on a line parallel with said alley, 191 feet to a 20-foot alley; thence northwardly on a line with said alley 131 feet to a stake; thence east on a line parallel with the first-mentioned alley to the beginning on Orleans st., being lots Nos. 12 & 13 on *on* part of the property before conveyed to F. M. Cash by John Brown.

Petitioners state and charge that said attachment and levy, and return thereof by said sheriff of Shelby County, were duly and
7 legally made and returned into the law court of Memphis on the 1st day of December, 1866.

Petitioners further state that having first obtained on their petition leave of the U. S. district court for the district of West Tenn., to proceed to judgment in said cause, verdict and judgment were, on the 8th day of July, 1869, duly rendered in their favor in said attachment suit against said L. Kaufman in the sum of $19,311.81, and a venditioni exponas was ordered to issue from said court for the sale of said property hereinbefore described and attached in said suit, to satisfy said judgment; but it appearing to the said law court of Memphis that said L. Kaufman had before that time been adjudged a bankrupt on his
8 own petition by the U. S. district court for the district of West Tennessee, and finally discharged from his debts and liabilities; and it further appearing to said law court of Memphis that petitioners had obtained leave from said U. S. district court, on their petition, to proceed to judgment in said attachment suit as aforesaid, but execution thereof to be stayed until the further order of the said district court of the United States, the said law court of Memphis ordered that the issuance of said venditioni exponas be suspended and stayed accordingly.

Petitioners are advised that their levy of said attachment on the 30th of November, 1866, and judgment rendered thereon in said law
9 court of Memphis, created a valid lien on said real estate, on which said attachment was levied, from the date of said levy, and will override all decrees and judgments rendered on attachments in law or equity subsequent to said levy of November 30th, 1866.

Petitioners further state that George A. Davis, Raphael Pinotles and Phillip Straus, partners under the style of George A. Davies & Co., and citizens of the city and State of New York, filed their bill in the chancery court of Memphis, and issued their attachments thereunder and levied the same on the first day of December, 1866, on a portion of said property hereinbefore described, and which had been previously attached by your petitioners aforesaid.

10 Petitioners further state that Abram Levi, S. Dittlebuck, H. L. Loucheim, and Levi Dittlebuck, citizens of the city and State of

N. York, partners as Levi, Dittlebuck & Loucheim; and Henry Antler, Phillip Schaffer, Henry Cohen, and Gustave Gump, citizens of said city and State of New York, partners as Antler & Schaffer, filed their bill jointly on the 3rd day of December, 1866, in said chancery court of Memphis, took out their attachments and levied the same on the 4th day of December, 1866, on a portion of the said lands previously attached by your petitioners as aforesaid.

Petitioners further state that Samuel Carter, John Rose, Wm. H. Kirtland, Charles B. Peet, and John Wests, citizens of said city and State of N. York, partners as Carter, Kirtland & Co., filed their
11 bill Dec. 6th, 1866, in the chancery court of Memphis, issued their attachments, and that the same was on the 5th day of December, 1866, levied upon a portion of said land previously attached by your petitioners as aforesaid.

Petitioners further state that Jacob Stellheimer, Joseph H. Stellheimer, and Uhlrich Lemon, partners under the style of J. Stellheimer & Co., and citizens of the State and county of New York, filed their bill in said chancery court of Memphis, Dec. 27th, 1866, and, having issued an attachment, levied the same on the 28th day of December, 1866, on a portion of said land previously attached by your petitioners as aforesaid.

Petitioners further state that on the 9th day of August, 1867, the Jackson Insurance Company, a corporation in the city of Memphis, Shelby Co., Tenn., intervened by petition in said suit of J. Stell-
12 heimer & Co., by its treasurer, I. M. Hill, a citizen of said county of Shelby, State of Tennessee, and said company, by order of said court, became a party complainant in said suit.

Petitioners further state that John M. Davies, Thomas M. Gopsell, Robert K. Davies, and John M. Davies, jr., citizens of the city and State of New York, and partners under the style of John M. Davies & Co., filed their petition on the 22nd day of January, 1868, in said suit of J. Stellheimer & Co., were allowed to become parties complainant therein by order of said chancery court, obtained and issued an additional attachment therein, which was on the 22nd day of January, 1868, levied on another portion of said lands previously attached by petitioners as aforesaid.

Petitioners state that the foregoing attachment obtained by said parties from said chancery court were levied on and cover all the lots and parcels of lands hereinbefore mentioned and set forth as levied
13 on by the attachment of your petitioners on the 30th day of November, 1866, as aforesaid.

Petitioners again state that their attachment issued and was levied on the 30th day of November, 1866; that it was prior in time to all or any of said attachment issuing from said chancery court of Memphis, and having been perfected by judgment as hereinbefore stated, vests your petitioners with a prior lien upon the said lots and parcels of land therein described and levied on, and entitles them, as they are advised, to have their said claim and debt against said bankrupt, L. Kaufman, first satisfied out of the proceeds arising from the sale of said property.

Petitioners further state that notwithstanding the facts hereinbefore disclosed, and their prior lien on said lands as aforesaid, the said George A. Davies & Co., Levi Dittlebuck & Co., J. Stellheimer & Co.,
14 the Jackson Insurance Co., and John M. Davies & Co., after the consolidation of all said claims by order of said chancery court of Memphis, brought the same on to be heard together in said court in the latter part of November, 1868, without any leave of the U. S. dis't court

for the district of West Tenn., first had and obtained for that purpose, which court had before that time, as hereinafter more fully set forth, adjudicated L. Kaufman, the said dep't in said chancery suits, a bankrupt on his own petition filed the 30th day of July, 1868, in this court, and while said petition of said bankrupt was still pending in this court, and previous to said bankrupt discharge, the said parties obtained their decree in said chancery court, on the 16th day of December, 1868, to sell said lots and parcels of land attached by your petitioner as aforesaid, and direct*ly* the proceeds of said sales to be applied
15 to the satisfaction of the debt of said firms and parties. Petitioners further state that in pursuance of said decree of sale the clerk and master of said chancery court, on the 1st day of March, 1869, proceeded to sell said lots of land when the same were *la*id off by Messrs. Lewis & Craig, solicitors for Carter, Kirtland & Co., except the last lot above described, which was *la*id off by W. M. Randolph, esq., for I. M. Hill.

Petitioners state, on information and belief, that the said Carter, Kirtland & Co. have never complied with the terms of said sale, and that the same has not been confirmed; that the said court rendered a decree vesting said Hill with a pretended title to said lot, *la*id off by said W. M. Randolph, esq., for said Hill. Petitioners state that they were not parties before said chancery court to said bills, consolidated as aforesaid, nor to said decree, and are advised said decree is not binding on them, and cannot prejudice their prior lien on said property.
16 Petitioners state and charge that said decree was rendered in violation of and in fraud of the bankrupt act approved March 2nd, 1867, and that said purchases were made by said Carter, Kirtland & Co. and by said I. M. Hill with full knowledge and notice in law & in fact of petitioners' prior lien.

Petitioners further state that the said L. Kaufman had before that, to wit, on the 30th day of May, 1868, filed his voluntary petition in bankruptcy in this honorable court, and was by it adjudicated a bankrupt on the 14th day of July, 1868, before the rendition of said decree. Petitioners state that the said Kaufman, in Schedule B, annexed to his said petition, had set forth all the above-described lots and parcels of land attached by said firms obtaining said decree as part and parcel of his assets. Said Kaufman did also in Schedule A to said petition in bankruptcy set forth said debts of your petitioner and of said firms
17 as part of his liabilities, and that W. Y. Cirode and N. Coronna, citizens of Shelby Co., Tenn., were appointed his assignees in bankruptcy, all of which will more fully appear by said petition and proceedings in bankruptcy on file in this hon. court.

Petitioners state that on the 7th day of October, 1868, they suggested their debt and lien against said Kaufman and on said lots and parcels of land in said U. S. dist. court for the dist. of West Tenn., sitting in bankruptcy, suggested and stated that they had sued out and levied their said attachment on the 30th day of November, 1866; that said attachment suit was then pending in the law court of Memphis, and expressly claimed and asserted that by virtue of said attachment of said land they held a prior attachment lien on said lots and parcels of land over all other creditors of said bankrupt.

Petitioners further protested in said bankrupt proceedings in
18 said court against being treated as pro-rata creditors of said bankrupt, but claimed a good and valid lien on said lands by virtue of said attachment, which they aver has been made perfect and final by

the rendition of said judgement in said attachment suit in their favor by said law court of Memphis.

Petitioners further state that there has not as yet been any final disposition of the assets of said bankrupt, nor any final settlement of the rights, demands, claims, and liens of his creditors in said bankrupt proceedings in this hon. court, notwithstanding said bankrupt has received his discharge.

Petitioners state that said firms and said Jackson Insurance Co., complainants in said bills and petitions consolidated as aforesaid, notwithstanding they were schedule creditors of said bankrupt L. Kaufman, and had full knowledge and notice of the pendency of his bank-
19 rupt proceedings, did by said decree proceed and attempt to sell said lots and parcels of land attached by petitioners as aforesaid, and with full notice of petitioners' attachment and prior lien. Petitioners aver that said sale was a nullity and confer'ed no title on said Hill or any other purchaser under the same.

The premises considered, your petitioners pray that said W. Y. Cirode and N. Coronna, citizens of Shelby Co., Tenn., and assignees of said L. Kaufman, and that George A. Davies, Raphael Peixotto, Phillip Strauss, partners as George A. Davies & Co., Abram Levi, L. Dittlebuck, H. L. Loucheim, Adolp Loucheim, Joseph Loucheim & Levi Dittlebuck, partners as Levi, Dittlebuck & Loucheim; Harry Antler, Phillip Schaffer, Harry Cohen, and Gustave Gump, partners as Antler & Schaffer; Samuel Carter, John Rose, Wm. H. Kirtland, Charles B. Peet, and John Weits, partners as Carter, Kirtland & Co.; Jacob Stellheimer, Joseph H. Stellheimer, and Uhlrich Simon, partners
20 as J. Stellheimer & Co.; John M. Davies, Thomas M. Gopsell, Robert K. Davies, and John M. Davies, jr., partners as John M. Davies & Co., all citizens of the city and State of New York; and the Jackson Insurance Company and I. M. Hill, citizens of Shelby County, State of Tennessee, be made defendants to this petition; that they fully and truly answer all and every allegation thereof, that process and notice issue to said defendants, according to the course of this court sitting in bankruptcy; that the sale of said lots and parcels of land be declared null and void; that said property may be adjudged to form part of said Kaufman's assets in bankruptcy, and be put under the control of the said assignees, Cirode & Coronna, to be by them administered and disposed of in said bankruptcy proceeding according to law; that said lands be discharged from said decree and sales; that the attachment lien of your petitioners be declared valid and subsisting
21 and prior to the rights and liens of said defendants; that said property be sold by said assignees, and the proceeds thereof be first applied to petitioners' debt and the interest thereon, and the balance go, if any, to the parties interested therein according to their several priorities, as pro rata, as the creditors of said bankrupt may be entitled to by law in due course of the settlement of said bankrupt estate, and on the final hearing petitioners for all such other and further relief as may be just and lawful in the premises.

BULLOCK & LEE AND
HAYNES, STOCKTON & HAYNES,
Solicitors for Petitioners.

21½ *Bond for costs.—Filed August 20th*, 1870.

Know all men by these presents that Friedlander, Stich & Co., and J. H. Lowenstein are held and firmly bound unto W. Y. Cirode, assignee

of L. Kaufman & others, in the sum of two hundred & fifty dollars, to void on condition that said Friedlander, Stich & Co. do pay and satisfy all costs that may accrue in that behalf in the prosecution of a suit this day commenced by them by petition in the district court of the United States for the district of West Tennessee, at Memphis, against said W. Y. Cirode, assignee, et als., on failure of the plaintiffs to prosecute their said suit with effect, and also on failure of the defendants, if convicted, to pay said costs; and we agree that judgment on motion without notice may be rendered against us for the same.

Witness our hands and seals this 20th day of August, 1870.

FRIEDLANDER, STICH & CO.,
By HAYNES, STOCKTON & HAYNES, *Att'y*, [SEAL.]
J. H. LOWENSTEIN. [SEAL.]

22 *Demurrer to petition.—Filed Oct. 10th*, 1870.

Defendants, George A. Davies & Co., Carter, Kirtland & Co., J. Stellheimer & Co., the Jackson Insurance Company, and Ira M. Hill, demur to the petition filed in this cause by Friedlander, Stich & Co., and assign as grounds of demurrer—

1st. That this court has no jurisdiction of the subject-matter or parties.

2nd. That petitioners are not, upon their own showing entitled to relief, because, by proving their alleged claim in bankruptcy against L. Kaufman's estate, they waived their lien, if any they had, under and by virtue of their attachment sued out in the common law court of Memphis.

3rd. Because they came too late, even if at any time they were entitled to relief.

4th. Because there is no equity on the face of said petition to enable petitioners to the relief which they seek, or to any relief whatever.

KORTRECHT & CRAFT,
Sol's for Geo. A. Davies & Co., & Levi Dittlebuck & Louchein.
LEWIS & CRAIG,
Sol's for Carter, Kirtland & Co.
WM. M. RANDOLPH,
For L. Stellheimer & Co.

23 *Order.—Entered Oct. 12th*, 1870.

This cause, coming on to heard on the demurrer of defendants filed herein on the 10th day of October, 1870, the said demurrer is in all things overruled, and the defendants are allowed to answer, and, upon application of the solicitors for the defendants, they are allowed until the 1st Monday in January, 1871, to file their said answer; and upon application of W. Y. Cirode & N. Coronna, assignees of said bankrupt and defendants herein; they also are, by order of the court, allowed until said 1st Monday in January, 1871, to file their answers.

Order.—Entered Jan. 5th, 1871.

In this cause, on application of the defendants, twenty days' further time is given them in which to file their answers to the petition.

Answer of I. M. Hill.—Filed Jan. 30th, 1871.

The answer of Ira M. Hill to the petition herein exhibited them and others.

Respondent, from information and belief, denies that the petitioners were or are creditors of the said L. Kaufman, as they state, and
24 aver that their pretended debt is fictitious and false, and never did in reality exist. Respondent has been informed and believes that the petitioners were especial friends of the said Kaufman about the time he was disposing of his property in the fall of the year 1866, for the purpose of defrauding his creditors. They knew all his transactions, and N. Coronna, their agent in the city of Memphis, who sued out the attachment for them, was the confidential adviser of the said L. Kaufman about the said time. The said Coronna was the fraudulent vendee of a portion of the property that the said L. Kaufman so disposed of. And the petitioners Friedlander was the vendee of property that respondent has a good reason to believe the said Kaufman conveyed him for the purpose of defrauding his creditors, at about the time the said Kaufman was conveying away his property, as before stated. The petitioners, as respondent is informed by the records of the late law court of
25 Memphis, through the said Coronna, their agent, applied to one John C. Creighton, a justice of the peace for Shelby County, and obtained from him a writ of attachment against the property of the said L. Kaufman, returnable to the said law court. Respondent is informed and believes that the said writ was issued in a saloon in the city of Memphis near midnight, where the return of the sheriff was also prepared and signed, and after the said return was so signed the petitioners were allowed the said suit by attachment to remain in said court without taking any steps therein until May, 1869, and until after respondent had purchased the property, of which he is the owner, as will hereafter appear. And respondent believes and avers that the petitioners never would have proceeded in the said attachment suit if the decree in the suits of which the petition makes mention had not been unfavorable to said L. Kaufman. And respondent further believes and avers that the said attachment suit was prosecuted by collusion between
26 the said L. Kaufman and petitioners for the purpose in part of depriving respondent of the property he had purchased, as will be hereafter stated. And respondent also believes and avers that this proceeding is prosecuted with the same fraudulent purpose and by collusion between said L. Kaufman and petitioners, and that the property which he has purchased, if recovered of respondents, will not go to the payment of any debt that the said L. Kaufman owes the petitioners, but will in fact go to the use of the said L. Kaufman, for whose benefit respondent believes the petitioners are sueing herein.

Respondent also, further answering, says that he is advised and believes that the said attachment proceedings, for defects apparent upon the face of it, is void. Respondent also believes & charges that the recitals in the entry of the pretended judgment of the supplying of the last papers and of the filing of substantial copies is utterly false.
27 But if true, respondent is advised that they show that the action of the court in the premises was without authority and was void.

But whether the attachment proceeding is entirely void or not respondent further states and shows that the judgment which has been pronounced and which *which* the petition sets up is null, because (1) there never was any publication in the said attachment proceedings, as the

law requires. (2) The plaintiffs never filed any declaration in the said proceedings; if they did file any its filing was not authorized by law. (3) The defendant Kaufman never appeared in the said proceedings, or if he did appear it was after he had been adjudged a bankrupt and when he had no right to appear and when the object of his appearance, if he did appear, was to fraudulently facilitate the petitioners in the recovery of a judgment in the said proceedings, and thereby to hinder, delay, and defraud his other creditors.

28 Respondent is also advised that the judgment had in the said attachment proceeding in the said law court is void, because at the time said judgment was rendered, to wit, on the 8th day of July, 1869, there was no defendant in the said proceeding before the court, the said Kaufman having long before that time been discharged by this court in bankruptcy from his debts, including the debt of the petitioners, and his assignees never having been brought before nor having appeared in said law court.

And respondent is also advised that the leave given the petitioners by this court, if any was given, of which respondent leave the records to speak, to prosecute the said attachment proceeding to judgment was void, because at the time it was given the said Kaufman had already been discharged by the court as a bankrupt and was not then before it.

Respondent denies that the petitioners, by reason of the levy of the said attachment, or for any other reason, have a lien upon the said real estate.

29 Respondent admits the proceeding by George A. Davies & Co., Levi, Dittleback & Loubheim, Antler & Shaffer and Carter, Kirtland & Co., as stated in the petition, but for certainty and particularity he refers to the records of said suits when produced, and which he prays that the petitioners may be required to produce if needed.

Respondent admits the bringing of the suits by J. Stellheimer & Co. to which petitioner Freidlander was an original defendant, and that an attachment was issued therein, and that John M. Davies & Co. and the Jackson Insurance Company were made parties thereto, and of the proceedings in the said suit. Respondent prays that the record may be allowed to speak, and that the petitioners may be required to produce copies of the record.

Respondent admits that his codefendants, or some of them, did levy their several writs of attachment on all the lands that the petitioners claim to have attached, but respondent denies the validity of the attachment of the said lands by petitioners as before stated, and insists
30 that the petitioners have no rightful claim whatever.

Respondent admits that the pretended attachment of the petitioners appears to have been levied before the attachments of his codefendants, but respondent denies that the petitioners acquired any right thereby for the reasons before stated and others hereafter to appear.

Respondent admits the consolidation of the said suits of his codefendants, and that the same were finally heard in December, 1868, in the said chancery court without the leave of this court, and that a decree was rendered for the sale of the attached , and that the proceeds of the sale were directed to be applied to the payment of the proper debts.

Before the said causes were so heard the defendant Kaufman had been adjudged a bankrupt by this court, but whether he had been discharged before that time respondent does not know. But before the said causes were heard the defendant W. Y. Cirode and N.

31 Coronna had been appointed the assignees in bankruptcy of the said L. Kauf , and previously, on the 30th day of October, 1868, all the property of the said Kaufman had been conveyed by the register in bankruptcy to the said Cirode and Coronna as assignees in bankruptcy.

On the 20th day of November, 1868, the codefendants of respondent, who were plaintiffs in said suits in the said chancery court, notified the said Cirode and Coronna of the pendency of said suits, and that they might, if they choose, make themselves parties thereto. In pursuance of the said notice the said Cirode and Coronna appeared in the said chancery court and prayed to be admitted as parties defendant to the said suit, and the said court did thereupon order and decree that they be admitted parties defendant to the said suits, all as will fully appear from the records when produced, and particularly by the order made on the 23rd day of November, 1868. And when the said causes were

32 heard and when the decree was pronounced on the 16th day of December, 1868, the said Cirode and Coronna, as such assignees in bankruptcy, were before the said court as parties to the said suit; and in and by the said decree of the 16th of December, 1868, the sale of all the property attached was decreed and ordered for the satisfaction of the several debts therein decreed the several plaintiffs in the said suits, as has already been stated, and after satisfying the same the decree further directed that any surplus which should remain should be paid to the said Cirode and Coronna, as such assignees in bankruptcy.

Afterwards, on the first (1st) day of March, 1869, the petitioners in this proceeding, by the leave of the court, filed a petition in the said consolidated suits in the said chancery court praying to be made parties to the said suits, and to be permitted to establish their claim and to supersede the order of sale which had been made. And the

33 said chancery court refused to stop or postpone the said sale, but gave the petitioners leave to establish their priority, if any existed, to the fund arising from the sale, which the clerk and master, under the said decree of December, 1868, had then advertised.

The said property was afterwards, on the 1st day of March, 1869, sold by the clerk and master under the said decree of December, 16th, 1868, and at such sale respondent, being the highest and best bidder, became the purchaser of a lot on Goolee street, a lot on Orleans street, and a lot at the southeast intersection of Elliott and Causey streets, being portions of the property attached in the said suit of J. Stellheimer & Co. vs. L. Kaufman and others. The sale so made was reported by the clerk and master to the said chancery court on the 27th day of March, 1869, a decree was announced confirming the same, and respondent having paid to the parties entitled to the same the amount

34 of his bids, the said chancery court pronounced a decree that all the right, title, claim, and interest of each and every person who was a party to the said suits, either as plaintiffs or defendants, in and to each of the said lots be divested out of them and each of them respectively, and be divested in the respondent and his heirs and assigns.

The clerk and master was also thereby directed to make and certify a copy of said decree, and deliver the same to the respondent as his evidence of title; and the same has been done, and respondent has caused said copy to be recorded in the office of the register of Shelby County.

The said decree of December 16th, 1868, and April 4th, 1869, remain in full force and effect, and in nowise vacated, set aside, or reversed.

And respondent here pleads and sets up the same as a complete bar to the relief sought by the petition against him or against the
35 property he has purchased, and he prays the same benefit of this his plea *and* if it were formally and separately pleaded.

Respondent denies that the said decree' or any of them were rende red in fraud of the bankruptcy act, or in violation of it. They were pronounced in due course of law by a court having jurisdiction in suits which were instituted before the bankrupt act was passed, and to which the petitioners and the assignees in bankruptcy of the said Kaufman, as has already been stated, were parties, and, as respondent submits, this court has no power to set aside or vacate them.

The other matter' not hereinbefore answered respondent formally denies, and so far as he is to be affected by them prays that the said petitioners may be required to prove the same.

And having fully answered, respondent here demurs to the said petition, and prays the benefit of this his demurrer as if it were sep-
36 arate, and for cause of demurrer states: (1) This court has no jurisdiction to aid the petitioners in the enforcement of any lien they may have in virtue of the proceedings in the law court of Memphis; (2) the petition shows that the petitioners proved their debt in bankruptcy against the estate of the said L. Kaufman, and their doing so operated to dismiss their suit by attachment in the law court, and to extinguish any lien they might have acquired thereby; (3) if any one has a right to sue for the causes stated in the petition it is the assignees in bankruptcy of the said L. Kaufman and not the petitioner; (4) petitioners show no right in themselves to the land mentioned in the petition, nor do they make a case that entitles them to any relief whatever; (5) the petition has no equity.

Personally appeared the within named I. M. Hill, who, being duly sworn, deposes and says that the facts stated in the foregoing answer as of his own knowledge are true, and those stated on information he believes to be true.

37 I. M. HILL.

Subscribed and sworn to before me this 30th January, 1871.
ISAAC MORRISON,
U. S. Com'r.

Answer of defendants.—Filed May 26th, '71.

The joint and several answer of George A. Davies & Co., Levi, Dittleback & Loucheim, Antler & Shaffer, Carter, Kirtland & Co., J. Stellheimer & Co., The Jackson Insurance Company, and John M. Davies & Co.

Respondent' from information and belief be'ing that the petitioners were or are creditors of the said L. Kaufman, as they state and aver that their pretended debt is fictitious, and false *and false* and never did in reality exist. Respondents have been informed, and believe, that the petitioners were the especial friends of the said L. Kaufman about the time he was disposing of his property, in the fall of the year 1866, for the purpose of defrauding his creditors; they knew all his
38 transactions, and N. Coronna, their agent in the city of Memphis, who sued out the attachment for them, was the confidential adviser of the said L. Kaufman about the said time. The said Coronna was the fraudulent vendee of a portion of the property that the said L. Kaufman so disposed of. And the petitioner Friedlander was the ven-

dee of property that respondent' have good reason to believe the said Kaufman conveyed him for the purpose of defrauding his creditors. About the time the said L. Kaufman was conveying away his property as before stated, the petitioners, as respondents are informed by the records of the late law court of Memphis, through the said Coronna, their agent, applied to one John C. Creighton, a justice of the peace for Shelby County, and obtained from him a writ of attachment against the property of the said L. Kaufman, returnable to the said law court.

39 Respondents are informed, and believe, that the said writ was issued in a saloon in the city of Memphis, near midnight, where the return of the sheriff was also prepared and signed, and after the said return was so signed the petitioners allowed the said suit by attachment to remain in said court without taking any steps therein until May, 1869.

And respondent' believe and aver that the petitioner never would have proceeded in the said attachment suit if the decree in the suit of which the petitioner' makes mention had not been unfavorable to the said L. Kaufman. And respondents further believe and aver that the said attachment suit was prosecuted by collusion between the said L. Kaufman and petitioners.

Respondents also, further answering, say that they are advised and believe that the said attachment proceedings, for defects upon the face of it, is void.

40 Respondents also believe and charge that the recitals in the entry of the pretended judgment, of supplying the lost papers, and of filing of substantial copies is utterly false. But if *these* respondents are advised that they show that the action of the court in the premises was without authority and was void.

But whether the attachment proceedings is entirely void or not, respondents further state and show that the judgment which has been pronounced and which the petition sets up is null, because (1) there never was any publication in the said attachment proceedings as the law requires; and (2) the plaintiffs never filed any declaration in the said proceedings, or if they did file any, it' filing was not authorized by law; (3) the defendant, Kaufman, never appeared in the said proceeding, or if he did appear it was after he had been adjudged a bankrupt and when he had no right to appear and when the object of his appearance, if he did so appear, was to fraudulently facilitate the

41 petitioner in the recovery of a judgment in the said proceeding, and thereby to hinder, delay, and defraud his other creditors.

Respondents are also advised that the judgment had in the said attachment proceeding in the said law court is void, because at the time the said judgment was rendered, to wit, on the 8th day of July, 1869, there was no defendant in the said proceedings before the court, the said Kaufman having long before that time been discharged by this court in bankruptcy from his debts, including the debt of the petitioners, and his assignees never having been brought before nor having appeared in the said law court.

And respondents are also advised that the leave given the petitioner by this court, if any was given, of which respondent leaves the records to speak, to prosecute the said attachment proceeding to judgment was void, because at the time it was given said Kaufman had already been discharged by this court as a bankrupt and was not then before it.

42 Respondents deny that the petitioner was by reason of the levy

of said attachment, or for any other reason, have a lien upon the said real estate.

Respondents admit the proceedings by George A. Davies & Co., Levi, Dettleback & Locheim, Antler & Shaffer, and Carter, Kirtland & Co., as stated in the petition, but for certainty and particularity they refer to the records of the said suits when produced, and which they pray that the petitioners may be required to produce if needed.

Respondents admit the bringing of the suits by J. Stellheimer & Co., to which petitioner, Friedlander, was an original defendant, and that an attachment was issued herein, and that John M. Davies & Co. and the Jackson Insurance Company were made parties thereto, and of the proceedings in said suit respondents pray that the record may be allowed to speak, and that petitioners may be required to produce copies of the record.

43 Respondents admit that they and their codefendants or some of them did levy their several writs of attachment on all the lands that petitioners claim to have attached, but respondents deny the validity of the attachment of the said lands by the petitioners as before stated, and insist that the petitioners have no rightful claim whatever.

Respondents admit that the pretended attachment of the petitioners appears to have been levied before their attachment, but respondents deny that the petitioners acquired any right thereby, for the reasons before stated and others hereafter to appear.

Respondents admit the consolidation of the said suits, and that the same were finally heard in December, 1868, in the said chancery court without the leave of this court, and the proceeds of the sale were directed to be applied to the payment of the proper debts.

44 Before the said causes were so heard the defendant Kaufman had been adjudged a bankrupt in this court, but whether he had been discharged before that time respondents do not know, but before the said causes were heard the defendants W. Y. Cirode and N. Coronna had been appointed the assignees in bankruptcy of the said Kaufman, and previously, on the 30th day of October, 1868, all the property of the said Kaufman had been conveyed by the register in bankruptcy.

On the 20th day of November, 1868, plaintiffs in the said suit, in the said chancery court, notified the said Cirode and Coronna of the pendency of the said suits, and that they might, if they choose, make themselves parties thereto.

In pursuance of said notice the said Cirode and Coronna appeared in the said chancery court and prayed to be admitted as parties defendant to the said suits, all as will fully appear from the said records when produced and particularly by the order made on the 23rd day of

45 November, 1868, and when the said causes were heard, and when the decree was pronounced on the 16th day of December, 1868, the said Cirode and Coronna, as such assignees in bankruptcy, were before the said chancery court as parties to the said suit. And in and by the said decree of the 16th of December, 1868, the sale of all the property attached was decreed and ordered for the satisfaction of the several debts therein decreed the several plaintiffs in the said suits, as has already been stated, and, after satisfying the same, the decree further directed that any surplus which should remain should be paid to the said Cirode and Coronna as such assignees in bankruptcy.

Afterwards, on the 1st day of March, 1869, the petitioners in this proceeding, by leave of the court, filed a petition in the said consolidated suits in the said chancery court, praying to be made parties to the

said suits and to be permitted their claim and to supersede the order of sale which had been made, and the said chancery court refused to stop or postpone the said sale, but gave the petitioners leave to establish their priority, if any existed, to the fund arising from the sale, which the clerk and master, under the said decree of December 16th, 1868, had then advertised.

The said property was afterwards, on the said 1st day of March, 1869, sold by the clerk and master under the said decree of December 16th, 1868, and at such sale I. M. Hill, being the highest and best bidder, became the purchaser of a lot on Goslee, a lot on Orleans st., and a lot at the southeast intersection of Elliot and Causey st., being portions of the property attached in the said suit of J. Stellheimer & Co. vs. L. Kaufman and others. The sale so made was reported by the clerk & master to the said chancery court on the 27th day of March, 1869, and on the 4th day of April, 1869, a decree was prosecuted confirming the same, and the said Hill having fully paid to the parties entitled to the same the amount of his bids, the said chancery court pronounced a decree that all the right, title and interest of each and every person who was a party to the said suits, either as plaintiff or as defendant, in and to each of the said lots to be divested out of them and each of them respectively, and be vested in said Hill and his heirs and assignees. The clerk & master was also thereby directed to make and certify a copy of said decree, and deliver the same to said Hill as his evidence of title, and the same has been done, and said Hill has caused the copy to be recorded in the office of the register of Shelby County.

The said decrees of December 16th, 1868, and April 4th, 1869, remain in full force and effect, and in no wise vacated, set aside or reversed.

As to the other property sold the purchasers failed to comply and the sale therefore amounted to nothing. Respondents deny that the said decrees or any of them were rendered in fraud of the bankrupt act, or in violation of it. They were pronounced in due course of law by a court having jurisdiction in suits which were instituted before the bankruptcy act was passed, and to which the petitioners and the assignees in bankruptcy of the said Kaufman as has already been stated were parties, and as respondents submit this court has no power to set aside or vacate them.

The other matters not hereinbefore answered respondents here formally deny, and so far as they are to be affected by them pray that the said petitioners may be required to prove the same.

And having fully answered respondents here demur to the said petition and pray the benefit of this their demurrer as if it were separate, and for causes of demurrer state:

(1.) This court has no jurisdiction to aid the petitioners in the enforcement of any liens they may have in virtue of the proceedings of the law court of Memphis.

(2.) The petition shows that the petitioners proved their debt in bankruptcy against the estate of the said L. Kaufman, and their doing so operated to dismiss their said suit by attachment in the law court, and to extinguish any lien they might have acquired thereby.

(3.) If any one has a right to sue for the causes stated in the petition it is the assignees in bankruptcy of the said L. Kaufman & not the petitioners.

(4.) Petitioners show no right in themselves to the land mentioned in

the petition, nor do they make a case that entitles them to any relief whatever.

(5.) The petition has no equity.

KORTRECHT & CRAFT,
Sol's for Respondents.
LEWIS & CRAIG,
For Carter, Kirtland & Co.
J. STELLHEIMER & CO. AND
JACKSON INSURANCE CO.,
50 By W. M. RANDOLPH, *Sol'r.*
GAULT & McDOWELL,
Sol'rs for Jno. M. Davies & Co.

Henry S. Loucheimer, one of the copartners of the firm of Levi, Dittleback & Loucheimer, of the city of Philadelphia, parties to the foregoing action, being duly sworn according to law, says that the facts contained in the foregoing answer are true so far as they are stated of his own knowledge, and so far as they are stated upon information of others he believes them to be true.

HENRY LOUCHEIM.

New York, 10.4, 1871.

HENRY PHILLIPS, JR.,
U. S. Com'r.

UNITED STATES OF AMERICA,
District of California:

George A. Davies, one of the copartners of George A. Davies & Co., of the city of New York, now resident in San Francisco, a party to the foregoing action, being duly sworn according to law, deposes and says that the facts stated in the foregoing answer are true so far as
51 they are stated from his own knowledge, and so far as they are stated upon information from others he believes them to be true.

GEORGE A. DAVIES.

Sworn to and subscribed before me this 1st day of May, A. D. 1871.

EDW'D B. COLTER,
Clerk U. S. Dist. Court, Dist. of California.

Answer of W. Y. Cirode & N. Coronna.—Filed May 27, '71.

The joint and several answer of W. Y. Cirode and Coronna, assignees in bankruptcy of L. Kaufman, bankrupt, to the petition of L. Friedlander et al.

Come by attorney the respondents, W. Y. Cirode and N. Coronna, and for answer to so much of the said petition as they are advised it is material or necessary for them to answer, answering, say that they are the assignees in bankruptcy of the bankrupt estate of said L. Kaufman, bankrupt; that the said Kaufman filed his petition in bankruptcy in this hon. court on the 30th day of May, A. D. 1868; that the
52 said Kaufman was duly adjudicated a bankrupt as set forth in the petition, and these respondents became his assignees, and received from T. J. Latham, register in bankruptcy for said district, a deed of assignment for all the estate of said Kaufman on the 13th day of October, A. D. 1868.

Respondent Cirode says that as to the commencement of the attachment suit of L. Friedlander and others on the 30th day of November, 1868, against the said Kaufman, he has no personal knowledge, but by the record referred to in the petition, on information and belief he admits the same, nor has he any knowledge of the commencement of the chancery suits of his several codefendants herein mentioned and set forth in the petition, but on information and belief from the records referred to in the petition he admits the same, as well as the prosecution of the said several suits as set forth in the petition and the proceedings severally had therein save as may be hereinafter set forth.

53 Respondent Coronna of his own knowlege admits the commencement and prosecution of the said attachment suit of Friedlander et al. in the law court of Memphis, as fully set out in said petition, and also admits the commencement and prosecution of the other chancery attachments suits as set out in the petition and the several levies made thereunder upon the property of said Kaufman, as therein described.

Respondents have no knowledge of the several amounts claimed to be due by the several attachments creditors, from said Kaufman, except that respondent Coronna states on information and belief that L. Friedlander & Co. is correctly set forth, as he, Coronna, previously to the bankruptcy of said Kaufman, was the agent of said firm of Friedlander, Stich & Co. to sue out the attachment of said Friedlander, Stich & Co. against L. Kaufman, on the 30th day of November, 1866, for the amount of their said claim against said Kaufman, as

54 stated in the petition, viz, the sum of $18,000.00. So far as the dates and several steps taken in the said several suits against Kaufman are concerned, respondents are neither of them familiar with the same, said Cirode never having been a party to said proceedings until the 23d day of November, 1868, if at all; and said Coronna, although previous to said last named date a party to the chancery proceedings mentioned in the petition, was simply interested as a party thereto as a defendant.

Respondents now show to the court that their connection with said chancery court proceedings mentioned in the petition was as follows:

On receiving the assignment of the estate and effects of said bankrupt, L. Kaufman, and upon examination of his schedule filed under the bankrupt act, the fact appeared that said schedule, with the petition for adjudication were filed, as heretofore stated, on the 30th

55 day of May, 1868; said schedules exhibited the names of the said several attaching creditors, together with the amounts due to each, which amounts according to the said schedules aggregated the sum of $43,500, or thereabouts. Respondent Cirode had the chief management of said case and estate, he being at that time the assignees in a very large number of other cases, and respondent Coronna being then closely engaged in his private business.

Respondent Cirode had a regular attorney an' solicitor, who attended to all his cases in bankruptcy, and investigated the same as they came into the office. Respondent Cirode on information now states, upon the said case coming to his hands the schedule was examined showing the debts, creditors, and attachment suits as aforesaid; and upon being investigated by his said solicitor, it was found that all said attachment suits had been commenced more than four months previous to the commencement of the said bankruptcy proceedings, and were there-

56 fore not dissolved by operation of the bankrupt act, and also that the value of the property attached was probably much less than the amount of claims represented by said attachment suits, and

that the only probable interest in the suits for the assignees would be the remote possibility of a surplus of the proceeds, arising from the sale of the attached property, after paying the attachment debts, which surplus could be secured at any time if there should be any surplus after settlement and final decree.

On account of these facts and conditions, no action was taken by the assignees to become parties to said suits, nor any other person to bring them, in so far as respondents know, until the 20th day of November, 1868, not quite a month after the execution of the assignment to respondents upon said last named day, these respondents were served with a notice of the pendency of said several suits, and the fact that they were on trial, which notice was signed by the counsel for the said attaching creditors, and a true copy of which, together with a
57 return of service thereon, is filed herewith and made a part of this answer, marked Exhibit A, and the original is on file in the said several causes in chancery, to be produced at the hearing in original or transcript.

Upon service of said notice respondent's counsel and solicitor went to the court-house and the chancery court-room, when he found said causes on trial. Not having had any opportunity to examine closely the papers and pleadings in said causes, he relied upon the statements of the counsel for the several creditors, which were in effect that the only interest which the assignees could possibly have therein was to claim such surplus as might remain after settling of the attachment claims; whereupon he assented to an order showing the presence of the assignees, by him as their counsel, and such order was accordingly drawn up and entered in the following words, to wit:

"Came N. Coronna and W. Y. Cirode, assignees in bankruptcy
58 of Louis Kaufman, and they are by consent made defendant in these causes, with all the benefit of any defence they might at any time have had in any manner as such assignees, they consenting that the hearing shall now proceed."

Said order was entered while the said causes were on trial, and was agreed to by respondent's counsel, because he could not stop the proceedings if such had been the proper course, and in order to save such rights as the assignees might be found to have in the premises.

Such, according to the information and belief of respondents, and so far as they can speak of their own knowledge, were the facts connected with the appearance respondents in said causes.

As to the equities and contest between said creditors who attached in chancery and these petitioners, Friedlander & Co., these respondents have no knowledge or interest, save as hereinbefore set forth. They consider themselves as trustees for the benefit of all creditors and
59 the instruments of this honorable court to perform its decrees as to the disposition of the estate in bankruptcy, when the right of the several creditors mentioned in the petition shall have been settled and determined by the court, and should the petitioners, Friedlander et al., be held herein to have a prior lien by reason of their said prior attachment, respondents also, with the said petitioners, ask that the property involved and mentioned in the petition be ordered to be turned over to these respondents for distribution as the assets of said bankrupt under the order of the court. And having fully answered, as they are advised, all that is material or necessary for them to answer in said petition, these respondents pray the advisement of the court in the

premises, and for all necessary orders and relief for the advisement and protection of their rights as assignees.

And will ever pray, &c.

CHAS. A. CHOATER,
Sol. for Respondents.

60 W. Y. Cirode and N. Coronna make oath that the statements contained in the foregoing answer made of their own knowledge, respectively, are true, and those stated on information and belief by each, respectively, they believe to be true.

N. CORONNA.
W. Y. CIRODE.

Sworn to before me this 27th day of May, 1871.
[L. S.] S. S. GARRETT,
U. S. Com'r.

Order.—Entered June 1st, 1871.

In this cause the plaintiff's solicitor came and moved the court to strike the demurrer out of the answer of George A. Davis & Co., Levi Dittleback & Loucheim, Archer and Schaffer, Carter, Kirtland & Co., J. Stellheimer & Co., The Jackson Insurance Company, on the ground that a demurrer on the same grounds were heretofore filed by said def't to the petition, which was overruled by the court, which motion is sustained by the court, and the demurrer of said parties is stricken
61 out, and on motion that the same demurrer as to John M. Davies be overruled, and the court, understanding the same, does overrule said demurrer of the said John M. Davies in the said answer.

The court, on motion, is further pleased to order that the demurrer contained in the answer of J. M. Hill in this cause be also ruled and disallowed.

Order.—Entered June 1st, 1871.

This cause comes on to be heard on the 27th day of May, before the district court of the United States, sitting in bankruptcy, for the district of West Tennessee, on the petition and answer filed in the cause. And it appearing to the satisfaction of the court that it is necessary in the state of pleadings to determine the priority in order of time between the several attaching creditors in the petition and answer mentioned as to the issuance and levy thereof on the land mentioned in
62 the pleadings, to facilitate and aid the court in coming to a determination as to which of said attaching creditors holds a prior lien or liens on said lands, and first entitled to be paid out of the proceeds of the sale thereof, it is therefore ordered, adjudged, and decreed that a reference be, and is hereby, made to the register in bankruptcy, T. J. Latham, to take such proof as shall be offered by the parties, in addition to the facts admitted in the pleadings, which shall be relevant and competent, and report at the earliest day practicable—

1. The order of time at which the several attachments mentioned were issued and levied on said bonds, and the priorities between the conflicting attachment liens.

2. Whether the petitioners where and are still the creditors of the

said L. Kaufman, as alleged in their petition; and, if so, in what amount.

3. Whether any leave was obtained from this court by the petitioners to prosecute their said attachment suit in the law court of Mem-
63 phis to judgment against said bankrupt, L. Kaufman, and also whether the defendants obtained leave to prosecute their said chancery suit.

4. Whether it would be for the interests of all parties to sell said lands, the proceeds thereof to be subject to the further order of this court.

Register's report.—Filed Jan. 6th, 1872.

At Memphis, said district, December , 1871, before T. J. Latham, register.

The undersigned, to whom was referred by special order certain questions on which to report in said matter, respectfully submits the following:

He is ordered to report, first, "The order of time and which the several attachments mentioned were issued and levied on said lands."

A careful examination of the voluminous records of the chancery and law courts discloses but one or two unimportant contradictions of the dates set out in the petition and answer filed in the district court. Indeed, it is apparent from the pleadings filed in this court that
64 the issue is not as to the time, but the regularity and validity of the proceedings instituted by the petitioner in the law court. The following is the order of time in which the several attachment proceedings occurred:

1st. November 30th, 1866, Friedlander, Stich & Co. filed their attachment bill in the law court of Memphis, and on the same day or rather night, but before midnight, according to the return of the sheriff, levied their attachment writ on the real estate in controversy, the property of the said L. Kaufman.

2nd. Dec'r 1st, 1866, George A. Davies filed their attachment bill in the chancery court of Memphis, and issued and levied their attachment writ on the same day on a portion of the said property.

3d. Dec. 3d, 1866, Levi, Dittleback & Loucheim and Autler & Shaffer filed their bill in said chancery court, and on the 4th Dec., 1866, issued and levied their writ on the property, on a portion of that levied on by Friedlander, Stich & Co.

4th. Dec. 5th, 1866, Carter, Kirtland & Co. filed their bill in
65 said chancery court, and levied their writ on same day on the property or a portion of the same levied on by said Friedlander, Stich & Co.

5th. Dec. 27th, 1866, J. Stellheimer & Co. filed in said chancery court their attachment bill, and on the 28th Dec., 1866, issued and levied their writ on the same property, or a portion of the same.

6th. January 9th, 1867, the Jackson Insurance Co. intervened, and—

7th. January 22nd, 1868, John M. Davies & Co. made themselves parties to the bill of said J. Stellheimer & Co., and levied their writ as above.

He is ordered to report, second, whether the petitioners were and are still the creditors of said L. Kaufman, as alleged in their petition; and, if so, in what amount.

No proof has been offered by the defendants in opposition to the

judgment of petitioners rendered in said law court, while, on the contrary, the deposition of L. Kaufman, taken by the petitioners, states that he was indebted in the sum of about $18,000 in good
66 faith, and that he has never paid the same. As to these proceedings, therefore, the judgment of $19,311.81 stands uncontested, though the answer charges the same to be entirely fraudulent.

Third. Whether any leave was obtained from this court by the petitioners to prosecute their said attachment suit in the law court of Memphis to judgment against said bankrupt, L. Kaufman; and, also, whether the defendants obtained leave to prosecute their said chancery suit. It is not claimed by the latter, either in their answer or in these proceedings under said order of reference, that they obtained such permission. The petitioners aver in their petition that they had such leave, but this is denied by defendants. The only proof on file is that found in the judgment of the said law court of Memphis, in favor of Friedlander, Stich & Co. against said L. Kaufman, which said judgment recites, "that the plaintiffs have obtained leave of the said district court to pro-
67 ceed to judgment; said judgment was rendered July 8th, 1869, and the bankrupt received his final discharge March 24th, 1869.

Fourth. Whether it would be for the interest of all parties to sell said lands, the proceeds thereof to be subject to the further order of this order.

No proof whatever has been offered on this point, but I should not think it advisable to make said sale. It is certainly not a favorable time to sell real estate, while the proceeds arising from the sale would remain in court until the termination of the litigation, by which time it is not improbable that there will be an appreciation in said lands much more than is sufficient to pay taxes. Besides it may be that a portion at least of the grounds may be rented.

T. J. LATHAM,
Register.

68 *Agreement as to register's report.—Filed June 6th*, 1871.

On the 27th day of December, 1866, J. Stellheimer & Co. filed on the chancery side of the common law and chancery court of the city of Memphis their bill, sworn to, against Louis Kaufman and others, and on the same day caused a subpœna to be issued, and also a writ of attachment against the said Kaufman.

The object of the bill to set aside certain conveyances made by the said Kaufman which were charged to have been made to hinder, delay, and defraud his creditors, and to subject to the payment of Kauffman's debts to the plaintiffs.

The bill was filed on behalf of all the other creditors as well as of the plaintiffs.

Under the attachment issued in this suit a garnishment was served by the sheriff on J. D. Williams, one of the defendants, who afterwards filed an answer as garnishee, stating that he was indebted to said
69 Kaufman, on account of goods purchased from him, in the sum of five thousand three hundred and twenty-three dollars ($5,323.00), which by agreement between them was to be paid in a lot on the southeast corner of Elliott and Causey streets in the city of Memphis, valued at six thousand dollars ($6,000.00), which the said Williams still held the title to and had an interest of $\frac{677}{6000}$ in, but which he was willing the court should decree the sale of. The defendants, including Louis Kaufman, answered the bill.

On the 9th day of Jan., 1867, the Jackson Insurance Company was made a party plaintiff to the bill of the said J. Stellheimer & Co. under the provisions of sec. 4290 of the code of Tennessee.

And afterwards, on the 22nd day of January, 1868, John M. Davies & Co. were made parties under the same section of the code, and upon so being made parties they caused a writ of attachment to
70 issue in the cause at their instance, which afterwards, on the 22nd day of January, 1868, was levied on the lot on Orleans st., being the same that were afterwards sold under the decree and purchased by the defendant I. M. Hill. Proof was then taken on behalf of all parties to the suit.

X.—On the 20th day of November, 1868, the notice of which Exhibit X is a copy, was served on the assignees in bankruptcy of L. Kaufman.

A.—On the 21st day of November, 1868, a short time before the hearing of the cause the order hereto appended and marked Exhibit A was made.

B.—On the 16th day of December, 1868, the cause was heard, and the decree hereto appended marked B was pronounced.

Y.—On the 1st day of March, 1869, the petition of Friedlander, Stich & Co., a copy of which is hereto appended and marked Exhibit Y, was filed under the order of the chancellor appearing therein.

C.—On the 27th day of Mar., 1869, the decree hereto appended
71 and marked C was pronounced in the said cause.

The record does not show that any action whatever was ever taken by the chancery court upon the petition of Friedlander, Stich & Co., filed March 1st, 1869, as aforesaid.

F.—Bidders and purchasers were on the 1st day of March, 1869, the day of the sale of said property, under the said decree, publicly notified at the time and place of said sale of the prior lien claimed by the said Friedlander, Stich & Co., by James Gallagher, esq., who, at the time, was acting for and in behalf of said Friedlander, Stich & Co., as appears by this certificate hereto annexed and marked Exhibit F.

It is agreed that the above statement, including the exhibit therein referred to, may be taken and considered as a part of the report of the register in bankruptcy herein, and that the facts contained in the said statement shall have the same force and effect for the purposes of
72 this suit as if formally reported by the said register under a specific order of reference.

It is further agreed that either party to the suit, on the hearing, may, in addition to the portions of the *portions of the* record exhibited with or referred to in this agreed statement, refer to and use any other portions of the records of the causes herein referred with the same effect as if such portions of said records were here specified. And such portions of the records so referred to or used shall at the instance of either party be copied with the transcript or record in case an appeal is taken or a writ of error is sued out.

January 5th, 1872.

HAYNES & STOCKTON,
For Petitioners.
W. M. RANDOLPH,
Sol. for Defendants.

73 EXHIBIT X.

J. STELLHEIMER & Co. *vs.* L. KAUFMAN. } 1494. 418, H. D.

GEORGE A. DAVIES & Co. *vs.* L. KAUFMAM. } 613, H. D. Exhibit X.

LEVI DITTLEBACK ET ALS. *vs.* L. KAUFMAN. } 1434. 452, H. D.

CARTER KIRTLAND *vs.* L. KAUFMAN. } 621, H. D.

To W. Y. Cirode and N. Coronna, assignees in bankruptcy of L. Kaufman:

You will take notice that certain suits, as the same are stated above, are now pending in the chancery court of Memphis against L. Kaufman.

If you choose to make yourselves parties thereto, or to defend the same, you can do so immediately. The causes are not up for
74 trial, and you can act accordingly.

KORTRECHT & CRAFT,
Sol's for Geo. A. Davis & Co. and Levi Dittleback & Co.
LEWIS & CRAIG,
Sol's for Carter, Kirtland & Co.
WM. M. RANDOLPH,
Sol. for J. Stellheimer & Co. and Jackson Insurance Co.

A. M. Taylor is hereby appointed special deputy sheriff to execute & return the within process. Given under my hand and seal this 18th day of Nov., 1868.

A. P. CURRY, [SEAL.]
Sheriff Shelby County.

Endorsed as follows: 1494, 1429, 1432, 1441. Notice to assignees in bankruptcy to make their . Came to hand Nov. 19th, 1868.

Executed on W. Y. Cirode, assignee, Nov. 20th, 1868, by leaving him a copy of the within; and executed on N. Coronna, assignee, Nov. 20th, 1868, by leaving him also a copy of the within.

A. P. CURRY, *Sh'ff*,
A. M. TAYLOR,
S. D. S.

75 *Exhibit A to agreed statement.*

J. STELLHEIMER
vs.
L. KAUFMAN ET ALS.

GEO. A. DAVIES
vs.
L. KAUFMAN ET ALS.

LEVI DITTLEBACK ET ALS.
vs.
L. KAUFMAN ET ALS.

CARTER KIRTLAND
vs.
L. KAUFMAN ET ALS.

Came N. Coronna, & W. Y. Cirode, assignees in bankruptcy of L. Kaufman, and they are by consent made parties defendant in these causes, with all the benefit of any defence they might at any time have had in any manner as such as assignees they assenting that the hearing shall now proceed.

76 *Exhibit B to agreed statement.*

ABRAHAM LEVI, S. DITTLEBACK, ADOLPH Loucheim, and Levi Dittleback, partners a' Levi, Dittleback & Loucheim, and Henry Autler, Philip Schafer, Henry Cohen & Gustave Gamp, partners as Autler and Schafer,
vs.
LOUIS KAUFMAN ET ALS. — N. R. D., 1432.

SAMUEL CARTER, JOHN ROSE, WILLIAM H. Kirkland, Charles B. Peek, and John Werts, partners as Carter, Kirkland & Co.
vs.
LOUIS KAUFMAN ET ALS. — N. R. D., 1441.

JACOB STELLHEIMER, JOSEPH G. STELLheimer, and Ulrich Simon, partners as J. Stellheimer & Co.
vs.
LOUIS KAUFMAN ET ALS. — N. R. D., 1494.

77 GEORGE A. DAVIS, RAPHAEL PEIXOTTE, AND Phillip Strauss, partners as George A. Davis & Co.
vs.
LOUIS KAUFMAN ET ALS. — N. R. D., 1429.

THE JACKSON INSURANCE COMPANY, A BODY corporate chartered by the law *to* Tennessee,
vs.
OUIS KAUFMAN ET ALS. — N. R. D., 1494.

JOHN M. DAVIES, THOMAS M. GASSELL, ROBERT K. Davies, and John M. Davies, jr., partners as John M. Davies & Co.,
vs.
LOUIS KAUFMAN ET ALS.
} N. R. D., 1494.

The above several causes coming on to be heard together by consent of parties under the order entered on record on the 7th day of March, 1868, on the bills of the several plaintiffs, the answers of the several defendants, the depositions taken and on file, and the other documentary evidence on file in the several causes, the court finds that the
78 several conveyances executed by the defendant Louis Kaufman to the defendants, Solomon Halle, Josiah D. Williams, Abraham Harris, Joseph Witowsky, Louis Friedlander, Charles Wolfstein, and A. Halle severally, and by Joseph Alden to Aaron Brummer, were all made and executed in good faith and for valuable considerations, and that the plaintiffs severally are entitled to no relief against the said vendees, or the said property conveyed to them, and that the several writs of attachment and injunction herein issued improvidently as to them and the said property. It is therefore considered, judged, and decreed by the court that all and every of the said bills as to the defendants Solomon Halle, Abraham Harris, Joseph Witowsky, Louis Friedlander, Charles Wolfstein, A. Halle, Ernestine Kaufman, Anna Harris, Bertha Harris, Martin Griffin, Fisher A. Tyler, Bernard Brummer and Aaron Brummer be and the same is hereby dismissed, and that the several attachments herein issued and levied upon the said property, so conveyed as aforesaid to the said vendees, as to such property only be discharged, and that the several injunctions herein and awarded and issued as to the said defendant's vendees be dissolved, and that the said defendants recover of the plaintiff's in the foregoing suit, and of Francis A. Mason, O. C.
79 Burnham, Charles Kortrecht, M. Wolf, D. H. Lindauer, J. Arnold, Jacob Engle, Abraham Seesell, Ira M. Hill, and B. B. Waddell, who are severally sureties of some one of the plaintiffs on their cost bonds, the cost of making the said above-named defendants parties, and of their several defences, the same to be paid by each of the said plaintiffs and their sureties ratably. And the execution may issue therefor, and the court further finds that the defendant Louis Kaufman is justly indebted to the plaintiffs Autler & Schafer, including principal and interest, to date in the sum of seven hundred and nineteen dollars and sixty cents, ($719.60) and to the plaintiffs Levi, Dittlebach and Loucheim in the sum of seven thousand four hundred and sixty-three dollars and three cents, and to the plaintiffs Carter, Kirtland & Co. in the sum of nine thousand two hundred and seven dollars and forty-three cents, ($9,207.43), and to the plaintiffs George A. Davies & Co. in the sum of six thousand three hundred and forty-seven dollars and eighty-seven cents ($6,337.87), and to the plaintiffs J. Stellheimer & Co. in the sum of four thousand nine hundred and fifty-three dollars and forty-three cents ($4,953.43), and to the plaintiffs The Jackson Insurance Company in the sum of four thousand eight hundred and ninety dollars and fifty-nine cents ($4,890.59), and to the plaintiffs John M. Davies & Co.
80 in the sum of seventeen hundred and eighty-two dollars and fifty cents ($1,782.50).

It is therefore considered, adjudged, and decreed by the court here that the said plaintiffs severally do have and recover of and from the said defendants, Louis Kaufman, the said several sums as above found to be due them respectively, and all the costs of this suit, except the

costs already disposed of, and that executions issue therefor; and it further appearing to the court that some or all of the writs of attachment issued in the above-stated cases have been levied on the following described property, and that the same is liable to be sold to satisfy the decrees hereinbefore rendered, or some or all of them, to wit: Lots ten and eleven, on the north side of St. Charles street, each lot fronting on said street sixty feet, and running back in parallel lines one hundred and forty-eight and one-half feet (148½) to an alley, as designated on Rucker & Parson's subdivision of grounds for Wm. Conly. Also lot No. four (4), in the block number thirty-five (35), thirty-four on Todd & Grider's map of the city of Memphis, in the town of Fort Pickering, lying on the north side of Carolina street two hundred thirty-seven and one-half feet (237½) west of intersections of Carolina and Eighth
81 streets, and fronting westwardly on Carolina one hundred feet (100), and running back between parallel lines one hundred and seventy feet (170). Also nine and $\frac{49}{100}$ acres of land, part of what is known as the Rayland tract, beginning at the northeast intersection of Grove avenue with Roberson street, twelve hundred and thirty-six feet (1,236), to a stake within fifty (50) feet of the centre of the Memphis and Charleston Railroad, thence south 45° east with said railroad five hundred fifty-nine and one-half (559½) feet to Rayland street, thence south with west side of Rayland street eight hundred & forty (840) feet to Grove avenue, thence west with the north line of Grove avenue three hundred & ninety-four (394) feet to the beginning. Also lot No. (6) six on the plan of subdivision of F. S. Latham, C. M. Fackle, and W. A. Jones, of lot number (3) three, in block number (55) fifty-five, on the plan of South Memphis, and bounded as follows:

Beginning at the northwest corner of said lot at the intersection of the south side of an alley twenty feet wide, with the east side of Goslee street, which is thirty (30) feet wide, thence southwardly with the east side of Goslee street seventy-seven (77) feet to the southwest corner, thence eastwardly one hundred & forty (140) feet to the
82 southeast corner, and to an alley twenty (20) feet wide; thence northwardly with the west side of alley seventy-seven (77) feet to the northeast corner, and to the south side of the first-named alley, thence westwardly with the south side of said alley one hundred and forty feet (140) to the beginning.

Also, a lot in South Memphis beginning at a point on Orleans street, on the west side one hundred (100) feet south of the intersection of the west side of Orleans street with the south side of a twenty (20) feet alley, which lies one hundred & seventy-seven (177) feet south of Vance street, thence south with Orleans street one hundred and thirty-one (131) feet, thence west parallel with said alley one hundred and ninety-one (191) feet to a twenty (20) feet alley; thence north with said alley one hundred and thirty-one (131) feet to a stake, thence eastwardly to the beginning, being the same conveyed by J. H. Sanone to the d'ft, Louis Kaufman, by deed of record in the office of the register of Shelby County, in book 57, part 1, pp. 637–638.

Also, a lot at the southeast intersection of Elliott & Causey streets, in the city of Memphis, having a front of one hundred and twenty five (125) feet on each of said streets, and being about square, in
83 which said lot the d'ft J. D. Williams owns an interest, $\frac{677}{6000}$, which is not liable to the said attachment, but which he consents may be sold herein.

And, also, the following-described property, to wit: One piano, one stool, and one cover, two large mirrors, two rocking chairs, two benches,

two chandeliers, two sofas, two tables, two velvet carpets, one stand with chinaware, twelve parlor chairs, one picnic view, one hat-rack, two wardrobes, one washstand, eight bed room chairs, one Brussels carpet, one mahogany bureau, one stair carpet, one hall oil-cloth, which was conveyed by the def't, Kaufman, to the def't Coronna, by a deed filed for record in the office of the register of Shelby County, on the 7th day of Dec., 1868, and there recorded, and which said conveyance the court here finds to have been void as against the creditors of the said def't Kaufman.

It is therefore ordered, adjudged, and decreed that the clerk and master proceed, after having first given thirty days' notice of the time, place, and terms of sale, to expose to sale and to sell all the said real estate at public auction to the highest bidder on a credit of six, twelve, and eighteen months, taking from the purchaser notes, with good and sufficient security, for the purchase-money, to be approved of by
the clerk & master, and retaining as a lien on the land sold for
84 the payment of the same and that there will exist no right or equity of redemption in or to the said land, or any part thereof, in the said def't, Kaufman, or any of the others of said def'ts; but the same shall be cut off and forever buried, and the title of purchaser or purchasers, upon confirmation of the report of sale and the payment of the purchase-money, shall be abolished, and the clerk and master will, as soon as the purchase-money of the said lot on the *said lot on the* corner of Elliott & Causey streets is paid, he will pay over to the def't Williams a portion thereof equal to his interest in the said lot as the same has been hereinbefore stated. And it is further considered, adjudged, and decreed that the clerk and master, after giving ten days' notice of the time, place, and terms of sale, shall expose to sale and sell at public auction, for cash, the said above-described personal property to the highest bidder.

And it is further considered, adjudged, and decreed that the
85 plaintiff recover of the defendant Caronna all the costs of making him a party, and of his defense, and of setting aside the said conveyance of the said personal property to him. And execution may issue therefor. And the clerk and master will retain out of the proceeds of the sale aforesaid *of* sufficiency of money to pay the costs of the several suits aforesaid in the first instance, and the costs adjudged against the several plaintiffs are to be deducted from the several debts. And there remain a surplus of the proceeds of the sale of the property aforesaid, or of the sale of any part thereof, after paying the debts aforesaid of the several plaintiffs in full, then such surplus shall be applied to the payment of the costs herein adjudged against the def't Kaufman, and the residue shall be paid to the defendants Cirode and Coronna, as the assignees in bankruptcy of the said defendants. And if such surplus remains, then the plaintiff will
pay the said Kaufman's costs, respectively, in proportion to the
86 amounts they severally recover on their said debts from the said sales, the same to be deducted out of the amounts to which they may severally be entitled. And they will have the benefit of their several judgements against Kaufman. And it appearing to the court that the attachment sued out by the plaintiffs J. Stellheimer & Co. was levied upon the same property on the 28th day of Dec., 1866, and that the plaintiffs The Jackson Insurance Company was, by order of the court made a party plaintiff in the said suit of J. Stellheimer & Co. on the 9th day of January, 1867, and that the plaintiffs John M. Davies & Co. were, by order of the court, made parties plaintiff in the said suit last mentioned on the 22nd day of January, 1868,

It is therefore ordered by the court that the said plaintiffs, respect-

ively, have priority of satisfaction of their debts aforesaid, and that the same be paid out of the proceeds of the last above-mentioned sales according to the priorities of the levies of their several attachments
87 and the date of the orders admitting them parties plaintiff to the said suits. And if further appearing that the process of garnishment served upon the said defendants did not have the effect of binding or creating a lien upon the said property on the corner of Eliott and Causey streets, but that the same was charged and a lien thereon created by an amended bill filed by the plaintiffs J. Stellheimer & Co., on the 22nd day of Feb'uary, 1867, from that date it is therefore ordered that the plaintiffs J. Stellheimer & Co. have a priority of satisfaction of their said debts, and that the same be paid first out of the proceeds of said sale of the said property, and that the residue of the proceeds of the sale, if any there be, go first to the plaintiffs The Jackson Insurance Company, and the balance, if any, to the plaintiffs John M. Davies & Co. And it further appearing that the personal property hereinbefore described was not attached by any of the plaintiffs except J. Stellheimer & Co., it is therefore ordered that the said J. Stellheimer
88 & Co. have a priority of satisfaction of their debt out of the sale of the personal property, and that the residue, if any, to The Jackson Insurance Company, and the balance, if any, to the plaintiffs John M. Davies & Co.

And it further appearing that the property hereinbefore described, situated on Goslee and on Orleans sts., was first attached under the supplemental attachment sued out by the plaintiffs John M. Davies & Co. on the 22nd day of January, 1868, when by order of the court here they were admitted parties plaintiff in the said suit of J. Stellheimer & Co., and that none of the other plaintiffs have caused attachments to be levied thereon, it is therefore ordered by the court that the proceeds of the sale of the said two lots or pieces of property be distributed pro rata between the plaintiffs J. Stellheimer & Co., the plaintiff The Jackson Insurance Company, and the plaintiff John M. Davies & Co. And it further appearing that the defendant John G. Finnie has been duly served with process of garnishment in the said suit of J. Stellheimer & Co. and others, and that he has failed to answer the same, on
89 motion of the plaintiffs it is ordered that a conditional judgment be rendered against the said Finnie in favor of the said J. Stellheimer & Co., The Jackson Insurance Company, and John M. Davies & Co. for the sum of eight hundred and ninety two dollars and fifty cents ($892.50), with interest thereon from the 6th day of February, 1866, that appearing to be the amount owing and due by him to the said defendant Louis Kaufman. And that scire facias issued out according to law requiring him to show cause why the said judgment should not be made final and obsolute.

And by consent of the plaintiff in interest it is ordered that if the defendant' Louis Kaufman and Coronna or either of them elect to retain the personal property hereinbefore decreed to be sold, and to pay to the clerk and master at any time before the sale of the same the of thirteen hundred and thirteen dollars ($1,313), the consideration
90 specified in the said conveyance from the said Kaufman to the said Coronna, to be credited and disposed of as the proceeds of the said personal property under the foregoing decree, then that they or either of them shall be permitted to do so. And the said personal property shall be thereby released from the operation and effect of the said decree, and be vested absolutely and fully in the defendant Coronna.

And the clerk and master will report his proceedings under the foregoing decree to the present term of the court.

The foregoing decree is not intended to effect the rights of any person or persons not before the court, but the rights of all such persons are saved to them respectively.

Decree entered on the 16th day of December, 1868.

Made Exhibit B to the agreement hereto appended.

Exhibit Y to agreed statement.

In the chancery court of Memphis.

91 To Hon. WM. M. SMITH, chancellor:

S. Friedlander and J. Stich and L. Sithauer, of the city and State of N. Y., copartners in trade under the firm-name and style of Friedlander, Stich & Co., respectively show to your honor that on the 30th day of November, 1866, they sued out an attachment against L. Kaufman for the sum of eighteen thousand dollars, which said attachment was issued by John C. Creighton, esquire, then an acting justice of the peace in and for Shelby County, and placed in the hands of the sheriff of Shelby County, who on the same day executed the same by levying upon the following real estate: Lots 10 and 11 on the north side of St. Charles street, each lot fronting on said street sixty feet and running back on *on* parallel lines 148½ feet to an alley, as designated on Rucker's and Parson's subdivision of ground for Wm. Crowley; also part of lot 4 in block 35, No. 34 on Todd and Grider's map of the
92 city of Memphis, in the town of ; said lot lies on the north side of Carolina street 237½ feet west of the inter section of Carolina and Eighth streets, and fronts westwardly on said Carolina street 130 feet, and runs back northwardly between parallel lines 170 feet. Also $\frac{94}{100}$ acres of land, part of what is known as the Rayland tract, beginning at the northeast intersection of Grove avenue with Robeson street, thence north with Robeson street 130 feet to a stake within 50 feet of the centre of the Memphis and Charleston Railroad, 559½ feet to Rayland street, thence south with the west side of said Rayland street 840 feet to Grove ave., thence west with the south line of Grove avenue 394 feet to the beginning.

Also the lots described as follows, situated in the city of Memphis, county of Shelby, and State of Tennessee: Beginning at a point on the west side of Orleans street 100 feet south of the intersection of
93 the west side of Orleans street with the south side of a 20-foot alley, which lies 177 feet south of Vance street, running thence southwardly with the west side of Orleans street 131 feet to a stake; thence westwardly on a line parallel with said alley 191 feet to a 20-foot alley; thence northwardly on a line with said alley 131 feet to a stake; thence east on a line parallel with the first-mentioned alley feet to the place of beginning on Orleans street, being lots No. 12 and 13 and part of the property heretofore conveyed to F. M. Cash by John Brown & Co.

Which said attachment was duly returned to and filed in the law court of Memphis, on the morning of the first day of December, 1866, and said is still pending undetermined in said court, and afterwards, as appears on rule docket 1432, Autler & Shaffer sued out in this court, an attachment against said L. Kaufman; also, as appears on rule docket 1441, Carter, Kirtland & Co. sued out an attachment against said L.

Kaufman; also, as appears by rule docket 1429, George A.
94 Davies & Co. sued out an attachment against said L. Kaufman; also, as appears by new rule docket, 1494, J. Stellheimer sued out an attachment against said L. Kaufman; also, as appears by new rule docket 1494, the Jackson Insurance Company, as well as John M. Davies & Co., sued out an attachment against said L. Kaufman. All said attachments except the one sued out by your petitioner, were sued out in this honorable court, and each and every of them were filed in this court, and the levies thereunder made after the levy made under your orators' attachment. Yours orators state, that it appears from the records that a reference was had in said causes, which had been consolidated, to the clerk and master, who reported the title to said property good, and of the value of $45,835.83, and that the indebtedness of Kaufman was as follows:

95	Carter, Kirtland & Co	$8,475 35
	J. Stellheimer & Co	4,482 75
	J. W. Steinbeck	2,335 50
	Autler & Shaffer	645 50
	George A. Davies & Co	3,748 98
	Law court: Friedlander, Stich & Co	18,000 00

Your orators state, that said Kaufman, after the filing of said attachments, filed in the United States district court for the district of West Tennessee, a petition in bankruptcy, and was by said court adjudged a bankrupt on his said petition, and by said court W. Y. Cirode and N. Coronna were appointed assignees; and the aforesaid property was, by said bankrupt, placed in his schedules in said court, subject to said attachments; but your orators are advised that none of the attachment creditors save themselves have proven their claims against Kaufman in said bankruptcy court. Your orators proved the amount of their claim. in said court, but expressly reserved their said lien by virtue of
96 their said attachments, and protested against a pro rata with general creditors.

Your orators state, that said property, and other property has been advertised for sale, under the order of this court, on the first day of March, 1869.

Your orators state that they are informed that some, or all of the said attaching creditors claim that in some way their attachment is not good.

Your orators state that they were not made parties to said suit, although it appears said attaching parties knew of your orators' attachment, as a certified copy was used in this court on the hearing.

Your orators state that said property is about to be sold as if the title were clear, without reciting the lien of your orators, and they are advised that if the existence of said lien is known to bidders at said sale it will deter them from bidding altogether, or cause them to bid for a low sum, and enable the purchaser at said sale to come in this
97 court and avoid his purchase, on account of the existence of said lien.

Your orators state that their claim is first, and that their attachment was properly served out, and that said suit is still pending in said court.

Premises considered, your petitioners pray that the said sale, as far as the same relates *relates* to the property attached by your orators, be postponed; that your orators be made parties to the said consolidated suit, and be permitted to establish their claim, and file their petition in said cause in some reasonable time to be by the court fixed, and have

such orders, decrees, and relief as shall to your honor seem equitable and just.

JOHN BULLOCK,
Sol. for Comp'ts.

J. Lithauer makes oath that the matter stated in the above and foregoing petition so far as the same is stated of his knowledge, is true. And those stated on the information of others he believes to be
98 true.

J. LATHAUER.

Subscribed and sworn to before me, March 1st, 1869.

R. J. BLACK,
D. C. & M.

Order of chancellor.

I decline making any order postponing the sale. The sale will proceed, and the compl'ts in this bill may file this, *or* [as] a petition in the consolidated causes to establish his priority if such exists to the fund arising from the sale.

March 1st, 1869.

WM. M. SMITH,
Chancellor.

Exhibit C to agreed statement.

The clerk and master having filed his report of sale herein on the 27th day of March, 1869, and the same not having been excepted to is in all things, approved and confirmed in the words and figures following:

99 Chancery court of Memphis.

JACOB STELLHEIMER & CO. ET ALS.,
vs.
LOUIS KAUFMAN ET ALS.

In these consolidated causes the clerk and master begs leave to report that, in obedience to an order of sale herein, at the November term, 1868, of said court, after giving the required notice of the time, place and terms of sale by advertisement, &c., proceeded to sell at public auction, to the highest bidder, in front of the clerk and master's office, in the city of Memphis, Tenn., on Monday the 1st day of March, 1869, upon a credit of six, twelve, and eighteen months from the day of sale, taking from the purchasers notes with security and retaining a lien upon the property until the payment of the purchase-money, as in said decree directed, the following described real estate, to wit:

Lot 6 on the plan of subdivision of F. T. Latham, C. M. Facker,
100 and W. A. Jones, of lot No. 3 in block No. 55, on the plan of South Memphis, and bounded as follows:

Beginning at the northwest corner of said lot at the intersection of the south side of an alley, 20 feet wide, with the east side of Goslee street, which is 30 feet wide; thence southwardly with the east side of Goslee street, 77 feet to the southwest corner; thence eastwardly 140 feet to the southeast corner, and to an alley 20 feet wide; thence northwardly with the west side of said alley, 77 feet to the northeast corner, and to the south side of the first-named alley; thence westwardly with

the south side of said alley, 140 feet to the beginning; when the same was struck off and sold to Wm. M. Randolph, bidding for I. M. Hill, at and for the sum of one thousand dollars ($1,000) his being the highest and best bid therefor.

A certain lot in South Memphis beginning at a point on Orleans street on the west side 100 feet south of the intersection of the west side of a 20-foot alley, which lies 177 feet south of Vance st.;
101 thence south with Orleans street, 131 feet; thence west parallel with said alley, 191 feet to a 20-foot alley; thence north with said alley, 131 feet to a stake; thence eastwardly to the beginning, being the same conveyed to defendant Kaufman by J. H. Sanona by deed of record in the registration office of Shelby County, Tennessee, in book 57, part 1, pages 637 & 638, when the same was struck off and sold to Wm. M. Randolph, bidding for I. M. Hill, at and for the sum of one thousand dollars ($1,000.00), his being the highest and best bid therefor.

A certain lot in South Memphis, beginning at a point on Orleans street on the west side, 100 feet south of the intersection of the west side of a 20-foot alley, which lies 177 feet south of Vance st.; thence south with Orleans street 131 feet; thence west parallel with said alley, 191 feet to a 20-foot alley; thence north with said alley, 131 feet to a stake; thence eastwardly to the beginning, being the same conveyed
102 to defendant Kaufman by J. H. Sonona by deed of record in the registration office of Shelby County, Tennessee, in book 57, part 1, pages 637 & 638; when the same was struck off and sold to Wm. M. Randolph, bidding for I. M. Hill at and for the sum of one thousand dollars ($1,000), his being the highest and best bid therefor.

A lot at the southeast intersection of Elliott & Causey streets, in the city of Memphis, having a front of 125 feet on each of said streets, and being about square, in which lot the defendant J. D. Williams owns an interest of $\frac{677}{8000}$, which is not liable to the attachment in these causes, but which said Williams consented should be sold, when the same was struck off and sold to Wm. M. Randolph, bidding for I. M. Hill, at and for the sum of five hundred dollars ($500), his being the highest and est and best bid*der* therefor.

The clerk and master further report that J. Stellheimer & Co., the Jackson Insurance Company, and John D. Davies & Co., to whom the proceeds of the purchases of I. M. Hill herein are going, have filed their receipt for twenty-five hundred dollars ($2,500), the amount of said Hill's purchases, less fifty-six & $\frac{40}{100}$ dollars ($56.40) which is the
103 interest of J. D. Williams in the lot at the intersection of Elliott and Causey streets, and pray the court that a decree may be entered, directing and vesting title to said property in the name of said I. M. Hill. The amount due J. D. Williams, $56.40, they have paid into court.

RECAPITULATION.

I. M. Hill 2,500 00

By BENJ. COLEMAN, *D. C.*

MARCH 27TH, 1869.

And it appearing from the said report that Ira M. Hill has fully paid to the parties entitled to the same the purchase-money agreed to be paid by him for the purchase of the several pieces of property bought by him as is shown by the said report, and that the plaintiffs fully agreed to a divest'ure of title:

It is therefore ordered and decreed that all the right, title, claim, and interest of each and every person who is a party to this suit, either as plaintiff or as defendant in and to each of the said several lots, pieces, and parcels of land so purchased by the said Ira M. Hill, be, and the same is hereby divested out of them, and each of them, respect-
104 *fully*, and vested in the said Ira M. Hill and his heirs and assigns.

And the clerk and master will make and certify a copy of this decree and deliver the same to the said Ira M. Hill to the end that it may be recorded as an evidence of the title.

STATE OF TENNESSEE, *Shelby County:*

I, Auguston Alston, clerk and master of the chancery court of Memphis, do hereby certify that the above and foregoing pages contain a full, true, and perfect transcript of the decree in the above stated cause vesting title in Ira M. Hill, as the same appears of record in my office entered April 3d, 1869, in new minute book No. 10, pages 500, 501, & 502.

In testimony whereof I have hereunto set my hand & seal of office at office in the city of Memphis, Tennessee, this 28th day of May, 1869.

[L. S.] A. ALLSTON, *C. & M.*
By BENJ. COLEMAN, *D. C.*

105 *Exhibit F to agreed statement.*

All persons bidding at this sale are notified that there is a prior attachment of Friedlander, Stich & Co. in the law court for eighteen thousand dollars on this property.

After the deputy clerk and master, Mr. Coleman, announced the title of the case and described the land, I announced in loud terms that as the agent of the within named firm and in the presence of one of the firm I was their agent, and read the within notice loud and distinct.

J. GALLAGHER.

MAR. 1ST, 1869.

Petition to prosecute suit to final judgment in the State court.—Filed Jan. 6th, 1872.

In the United States district court for the district of West Tennessee.

IN THE MATTER OF }
L. KAUFMAN, BANKRUPT. }

To Hon. Connally F. Trigg, judge.

106 J. Friedlander, J. Stich, L. Lithauer. Friedlander, Stich & Co. respectfully shew that there is a suit pending in the law court of Memphis in their favor and against the bankrupt, that there is a dispute as to the exact amount due, and they respectfully pray permission to proceed with said suit to judgment.

JOHN BULLOCK, *for Pet.*

Jno. Bullock, attorney for Friedlander, Stich & Co., makes oath the facts stated in the above petition are true.

JOHN BUI

Subscribed and sworn before me April 8th, 1869.
ISAAC MORRISON,
U. S. Com'r.

Endorsed as follows:
The prayer of this petition is granted.
CONNALLY F. TRIGG,
U. S. District Judge.

107 *Deposition of L. Kaufman.—Filed Jan'y 6, '72.*

The deposition of LOUIS KAUFMAN in presence of atto's for both sides.

Interro. 1. What is your name and age?
Ans. L. Kaufman; age, forty-four.
Interro. 2. Were you indebted to Friedlander, Stich & Co., the petitioners in this case, in any sum on the 30th November, 1866; and, if so, in what amount?
Ans. I was indebted to said firm at said date about eighteen thousand dollars.
(Objected to as too indefinite and uncertain by dep'ts.)
Int'g. 3. Was it a fictitious debt or bona fide? If the latter, what was the consideration?
(Objected to as irrevolant and incompetent and also because the question is leading by dep'ts.)
Ans. I owed it in good faith for goods bought of them.
Int. 4. Have you any knowledge that the debt has ever been paid, or is it still due and unpaid?
108 Ans. I have never paid it, nor have I any knowledge that any one else has.

Cross examined:

Int. 1. Are you the bankrupt as to whose estate this contest relates?
(Objected to as secondary evidence by pe'tioner's counsels.)
Ans. I am.
Int. 2. Is N. Coronna, one of your assignees in bankruptcy, the same person who acted as agent for Friedlander, Stich & Co. in sueing out the attachment against your estate in controversy here?
(Objected to by att'y for Friedlander, Stich & Co. because not embraced in order of reference and departs therefrom.)
Ans. Yes.
Int. 3. Were you present when the affidavit for said attachment was made?
(Objected to for same reason as above, and because irrelovant to matters referred.)
Ans. I knew nothing of it till sheriff summoned me.
109 Int. 4. Were you summoned? How, and by whom?
Ans. I think I was in this case. I cannot say by whom, but think by Sheriff Winters. So many attachment summons about that time were served on me I cannot be explicit.
(Objected to by petitioner's counsel as irrevolant and a departure from the reference.)
Int. 5. Have you a copy of the account for the merchandise bought
l by you, as stated above?
b. (Objected to by petitioner's counsel as irrevelant.)
ag Ans. I have not. One for $1,300.00 is attached to my deposition in

chancery suit, viz, J. Stellheimer & Co., L. Kaufman et als., and the balance may be in my possession and may not; I do not know.

Int. 6. Will you examine and see if you owe the account for remaining $5,000.00?

(Objected to as illegal and irrevelant.)

Ans. I will.

110 Int. 7. Is the a/c appended to said deposition the only one you ever had for said $13,000.00 of goods?

(Objected to for irrevolency.)

Ans. It is.

Int. 8. Did you keep regular books a' merchant while dealing with Friedlander, Stich & Co.?

(Objected to as irrevelant and not authorized by the reference.)

Ans. I had no regular bookkeeper; nothing but a salesman, Mr. George Stovall, who did what work of that kind was done. I kept no regular books.

Int. 9. Did you keep any acc't with Friedlander, Stich & Co.?

(Objected to as irrevelant and not authorized by reference.)

Ans. I had a regular book in which I posted all bills as I received them.

Int. 10. Where is that book.

(Objected to as irrevelant and not authorized by the reference.)

Ans. I use the book now for my new firm. I took the bills out, it being a book merely of backs with hooks in it, on which bills could

111 be hooked and taken off.

(Objected to as unauthorized by the reference.)

Int. 11. Where are the bills?

(Objected to on the foregoing reasons and grounds.)

Ans. I never expected to be called on for them, and do not know what became of them.

Int. 12. Did you turn them over to the register in bankruptcy or to your assignees—the book or bills, or either of them?

(Objected to as secondary evidence.)

Ans. I did not.

Int. 13. Did you keep no other account with Friedlander, Stich & Co. than the one referred to in answer to question No. 9?

(Objected to as irrevelant and unauthorized by the decree.)

Ans. In a book we call a sales-book Mr. George Stovall entered all bills we bought; that is, he entered merely the name of the creditor, am't of bill, and when due.

Int. 14. Did you keep any other account with Friedlander,

112 Stich & Co. than the two kinds before alluded to?

(Objected to for the foregoing reasons stated to the last interrogatory.)

Ans. No.

Int. 15 How long did you deal with them?

(Objected to as irrevelant and unauthorized by decree.)

Ans. About 8 or 9 years.

Int. 16. What was the extent annually of your dealings with them?

(Objected to as immaterial and irrevelant and unauthorized by decree of reference.)

Ans. From $25,000.00 to $30,000.00 annually.

Int. 17. What was the extent of your entire business annually.

(Objected to as irrevelant and unauthorized by the decree of reference.)

Ans. About $150,000.00 to $160,000.00 annually.

Int. 18. Did you make said Frielander, Stich & Co. any payments or remittances during the time you dealt with them?

Ans. Yes.

Int. 19. Did you keep any account of them?

113 Ans. No. I had their receipts for them.

Int. 20. How did you ascertain the amount you owed said F., S. & Co. at time of sueing out said attachment against you.

Ans. They kept open accounts against me. When the statement was sent I compared my bills with it and found it correct.

Int. 21. Where is that statement now?

Ans. I pinned it to the deposition in the chancery suit before referred to.

Int. 22. Did you have any statement of the bill purchased?

Ans. I did not. I failed before the time to send it.

Int. 23. Had you paid Friedlander, Stich & Co. all your indebtedness to them up to the time of your purchase of the bill for $13,000.00?

Ans. I had not. There was a balance against me and which constituted a part of said $13,000.00.

Int. 24. Where are the books you kept while a merchant?

(Objected to as irrevelant and unauthorized by decree of reference.)

114 Ans. My sales-book I tore out the leaves. The bill book I used in my other business about a year and that was full, and children played with it and it was destroyed. I don't remember I had any other books.

Int. 25. Did you ever turn any of said books to the registers or your assignees.

(Objected to as secondary evidence.)

Ans. No.

Int. 26. Are you related to either of the firm of Friedlander, Stich & Co.?

Ans. No.

Int. 27. Are they particular friends of yours?

Ans. Just as far as the money goes they are friends.

Int. 28. Have you dealt with them since your bankruptcy?

(Objected to as irrevelant and unauthorized by reference.)

Ans. I have bought since my discharge in b'k'cy, I have bought $180.00 only from them.

Int. 29. Did you make any defence to the suit of Friedlander, Stich & Co. against you in the law court of Memphis.

115 Ans. I had Judge Hart engaged as my counsel and I believe he plead to this suit. I was never in court before. I instructed Judge Hart to plead to this case.

Int. 30. Did you have any other counsel engaged in this case?

Ans. No.

Int. 31. Did you pass a final examination before your discharge in bankruptcy?

(Objected to as secondary evidence.)

Ans. I did.

Re examined.

Int. 1. When you speak of being summoned by the sheriff can you say whether you were summoned by the sheriff in the attachment suit of Friedlander, Stich & Co., of 30th Nov., 1866, *are* in the attachment bills filed by Stellheimer & Co., George A. Davies, & other attachment suits in chancery.

Ans. I don't recollect which one?

Int. 2. Were you or not discharged in bankruptcy before the taking of this deposition?

Ans. I have had my discharge over 2 years.

116 Int. 3. Had you any agency whatever in having the said attachment of 30th Nov., 1866, issued?

Ans. No.

Int. 4. Was the paper you spoke of attached to your deposition in case of Stellheimer an itemized account of the merchandise bought from said Friedlander, Stich & Co. *are* simply a statement of the amount due them?

Ans. It was not an itemized account but a statement of the amounts due them.

Int. 5. Had you more salesmen than one?

Ans. I had more, but George Stovall was the principal one.

Int. 6. You speak of a book in which you posted bills. Did you paste or hook them?

Ans. I hooked them.

Int. 7. In the book you destroyed were all the matters settled it contained before you destroyed it?

Ans. They were, and the book was of no further use.

Int. 8. You speak of bills being torn out; were they torn out or not and settled up before you went into bankruptcy or after?

117 Ans. I destroyed them several months after my discharge.

Int. Did you or not set forth in your schedules truly all your assets and property on hand and all the creditors you owed when you went into bankruptcy?

Ans. I did.

And further this deponent saith not.

L. KAUFMAN.

Examination taken and subscribed and sworn to before me, July 20th, 1871, and further examination of other witnesses adjourned to Sept. 5th, 1871, at 10 o'clock a. m.

T. J. LATHAM,
Register.

Judgment from law court.—Filed Jan'y 6th, 1872.

STATE OF TENNESSEE:

Be it remembered that at a term of the law court of Memphis, in and for the county of Shelby, and State aforesaid, begun and held at the court-house in the city of Memphis on the second Monday in June

118 in the year of our Lord, one thousand eight hundred and sixty-nine, present and presiding the Hon. H. S. Lee, judge of the said court, the following proceedings were had and appear of record in a certain cause, wherein Friedlander, Stich & Co. are plaintiffs, and L. Kaufman is defendant, to wit:

Affidavit.

STATE OF TENNESSEE,
Shelby County, ss:

N. Coronna, agent for Friedlander, Stich & Co., makes oath that L. Kaufman is justly indebted to said firm in the sum of eighteen thousand dollars, due by account; that said claim is due, just, and wholly unpaid;

that the said Kaufman has disposed of his property or is about to dispose of his property with intent to hinder, defraud, or delay his creditors.

He prays a writ of attachment against the property of said Kaufman.

N. CORONNA.

Subscribed & sworn to before me Nov. 30th, '66.

JOHN C. CREIGHTON, *J. P.*

119 *Bond.*

We, Friedlander, Stich & Co., principal, and N. Coronna, surety, acknowledge ourselves to owe and be indebted to L. Kaufman, in the sum of thirty-six thousand dollars, to be void of the said Friedlander, Stich & Co., who have this day sued out an attachment against the said L. Kaufman returnable to the next term of the law court of Memphis, for $18,000, shall prosecute said suit with effect, & in case of being cast in said suit will pay all the costs and damages which may be adjudged against him, and all damages which the said defendant may sustain by the wrongful sueing out of this writ.

FRIEDLANDER, STICH & CO.,
Per BULLOCK, *Att'y.*
N. CORONNA.

NOV. 30TH, 1866.

Writ of attachment.

STATE OF TENNESSEE,
Shelby County:

To the sheriff of Shelby County:

120 Friedlander, Stich & Co., by their attorney, N. Coronna, having filed affidavit and given bond according to law, alleging that L. Kaufman is indebted to them in the sum of $18,000, and obtained an attachment, you are hereby commanded to attach sufficient of the estate of said Kaufman to satisfy said debt and the same retain; to compel the appearance of said defendant at next term, second Monday in Feb'r., 1867, of law court of Memphis to defend said action.

Witness my hands this 30th Nov., 1866.

JOHN C. CREIGHTON, *J. P.* [SEAL.]

(Endorsed:) Came to hand Nov. 30th, 1866, 9 o'clock p. m. Filed Dec. 1st, 1866. Mason, Hyde & Co.

Return.

This writ came to hand this 30th day of November, 1866, at 9 o'clock p. m., and there being no personal property of the within named defendants to be found in my county, and did immediately levy upon and attach the following real estate as the property of the within
121 named defendants, viz., lots No. 10 and 11, on the north side of St. Charles street, each lot fronting on said street 60 feet and running back in parallel lines 148½ feet to an alley as designated on Rucker's and Parsons' subdivision of grounds for Wm. Conley; also part of lot 4, in block 35, No. 34, on Todd's and Grider's map of the city of Memphis in the town of Fort Pickering.

Said lot lies on the north side of Carolina street, 237½ feet west of the intersection of Carolina and Eighth streets, and fronts westwardly on said Carolina street 130 feet, and runs back northward between parallel lines 170 feet. Also 94 $\frac{0}{100}$ acres of land, part of what is known as the Rayland tract, beginning at the northeast intersection of Grove avenue with Robeson st.; thence north with Robeson *'aid* 1236 to a stake within 50 feet of the centre of the Memphis and Charleston Railroad; thence south 45° east with said railroad 559½ feet to Ragland street; thence south with the west side of Ragland street, 840 to Grove ave.; thence west with the north line of Grove avenue 394 feet
122 to beginning. Also the lots described as follows, situate in the city of Memphis, county of Shelby, and State of Tennessee, beginning at a point on the west side of Orleans street, 100 feet south of the intersection of the west side of Orleans st. 100 *feet south of the intersection of the west side of Orleans street* with the south side of a 20-foot alley, which lies 177 feet south of Vance street, running thence southwardly with the west side of Orleans street 131 feet to a stake; thence westwardly on a line parallel with said alley 191 feet to a 20-foot alley; thence northwardly on a line with said alley 131 feet to a stake; thence east on a line parallel with the first mentioned alley, feet to the place of beginning on Carolina street, being lots No. 12 and 13, and part of the property heretofore conveyed to F. M. Cash by John Brown, &c.

P. M. WINTERS,
Sheriff, S. C.

Affidavit.

STATE OF TENNESSEE,
Shelby County:

Law court of Memphis.

FRIEDLANDER, STICH & CO.
vs.
L. KAUFMAN.

123 John Bullock makes oath that he was attorney for the plaintiffs and sued out from John C. Creighton, esq., an acting justice of the peace in and for Shelby County, Tennessee, an attachment against above defendant for $18,000, which was levied on the real estate of the defendant.

That on the 24' day of May, 1867, this affiant filed a declaration in this court with a probated bill for said a/c.

That shortly after, at the same term of court, def't filed a plea in abatement, and this affiant informed def't that he would, for his accommodation, pass the case, which was done.

Meanwhile the papers were lost and were not found until a short time since, when Mr. Lithauer found a portion of them, they having been in the possession *on* an attorney, not of pl'ffs, to be used in another suit, and there being no charge against any person for said papers on the clerk's book. Said cause is on the appearance docket. The annexed is a copy in substance of the said papers.

JOHN BULLOCK.

Subscribed and sworn to before me Jan'y 7, 1869.

ALFRED MATHIAS,
Clerk Law Court of Memphis.

124 Filed Jan. 21, 1869. G. Mathias, clerk. S. D. Thompson, D. C.

On the 24th day of May, 1869, being one of the days of the February term, 1869, of said court, the following proceedings were had, and appears of record on record book No. 20, page 8, to wit:

Entry on the minutes.

FRIEDLANDER, STICH & Co.
vs.
L. KAUFMAN. } 624, A. D.

For sufficient reasons appearing to the court it is entered that the parties to this suit be required to file in court supplied copies of the papers herein, which were heretofore filed by them.

On the 8th day of July, 1869, one of the days of the June term, 1869, of said court the following proceedings were had, and appears of record on record book No. 20, page 135, to wit:

FRIEDLANDER, STICH & Co.
vs.
L. KAUFMAN. } 624. A. 4008 T.

It appearing to the court that on the 30th day of November, 1866,

125 the plaintiffs sued out an attachment against the estate of the said L. Kaufman, which was on the same day by the sheriff of Shelby County levied on the following real estate as the property of the defendant, to wit: Lots ten (10), eleven (11), on the north side of St. Charles street, each lot fronting on said street (60) sixty feet, and running back parallel lines one hundred forty-eight and one-half (148½) feet to an alley, as designated in Rucker & Parsons' subdivision of grounds for Wm. Conley. Also part of lot four (4) in block thirty-five (35) (No. 34,) on Todd & Grider's map of the city of Memphis, in the town of Fort Pickering; said lot lies two hundred thirty-seven and one-half (237½) feet west of the intersection of Carolina and English streets, and fronting westwardly on Carolina street one hundred and thirty (130) feet, and runs back northward between parallel lines one hundred & seventy (170) feet. Al'o nine $\frac{49}{100}$ acres of land, part of what is known as the Ragland tract, beginning at the northeast intersection of Grove avenue with Robeson street 230 feet to a stake within (50) fifty feet of the centre of the Memphis & Charleston Railroad; thence south 45° east with said railroad 559½ feet to Ragland street; thence south with the west side of Ragland street 840 to Grove avenue, 394 feet to beginning. Also the lots described as follows, situate in the city of Memphis, county
126 of Shelby, and State of Tennessee: Beginning at a point on the west side of Orleans street one hundred and thirty-one (131) feet to a stake; thence westwardly on a line with said alley; thence northwardly on a line with said alley one hundred and thirty one (130) feet to a stake; thence east on a line parallel with the first-mentioned alley feet to the place of beginning on Orleans street, being lots number twelve (12) and thirteen (13), and part of the property heretofore conveyed to F. M. Cash by Jno. Brown; and it appearing to the court

that the said defendant appeared and filed a plea in said cause, and that the papers have been lost, and the court having entered an order that the respective parties supply the papers heretofore filed by them, and the plaintiffs having complied with said order, but the defendants having failed to do so, or to plead anew, it is ordered that judgment be rendered in favor of plaintiffs and against the defendant for
127 such default, and that a writ of inquiry issue, returnable instanter, whereupon to assess plaintiffs' damages.

Came a jury of good and lawful men, to wit, Nathan Schrourzenburgh, I. W. Tobin, C. H. Dow, S. B. Boice, Felix Galena, F. M. C. Devassa, Lewis McGeehee, G. Schonfield, F. F. Bowen, H. S. Hesekiah, H. J. Ensel, and T. C. Park, who, being duly sworn to well and truly assess the plaintiffs' damages, according to law and evidence, and after hearing the evidence do say they find for the plaintiffs in the sum of $19,311.81.

Whereupon it is considered by the court that the plaintiffs have and recover of the defendant the sum of nineteen thousand three hundred and eleven dollars and eighty-one cents, and that a venditioni exponas issue for the said property to satisfy said judgment; but it also appearing that said L. Kaufman has been adjudged a bankrupt on his own petition by the United States district court of Tennessee, and finally discharged from his debts and liabilities, and that the
128 plaintiffs have *have* obtained leave of said court to proceed to judgment in this case, but execution to be stayed, it is ordered by the court that said issuance of venditioni exponas be suspended until consent of said United States district court, or until the further order of this court.

STATE OF TENNESSEE:

I, Alfred Mathias, clerk of the law court of Memphis, in and for said county of Shelby and State aforesaid, do hereby certify that the foregoing is a full, perfect, and correct transcript of the record and proceedings had in a certain cause heretofore pending between Friedlander, Stix & Co., plaintiffs, and L. Kaufman, defendant, *and* the same appears on record and remains on file in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office, the 23d day of March, 1870.

[L. S.] ALFRED MATHIAS,
Clerk.

[5 5 Certificate cancelled. 5 5.]

129 *Papers filed from the chancery court of Memphis in case No.* 14944.

I. STELLHEIMER & CO. ET ALS.
vs.
LOUIS KAUFMAN.

In chancery court of Memphis.

To honorable Wm. M. Smith, chancellor:

L. Friedlander, J. Stich, and L. Lithauer, of the city and State of New York, copartners in trade, under the firm name and style of Friedlander, Stich & Co., respectfully show to your honor that on the 30th day of November, 1866, they sued out an attachment against L. Kaufman for the sum of eighteen thousand dollars, which said attachment was issued by John C. Creighton, esquire, then an acting justice of the peace in

and for Shelby County, and placed in the hands of the sheriff of Shelby County, who on the same day executed the same, by levying upon the following real estate, to wit: Lots ten & eleven, on the north side of St. Charles street, each lot fronting on said street sixty feet, and running back on parallel lines one hundred forty-eight and one-half feet
130 to an alley, as designated on Rucker & Parsons' subdivision of grounds for Wm. Crowley, and part of lot 4, in block 35 (No. 344), on Todd & Grider's map of the city of Memphis, town of Fort Pickering. Said lot lies on the north side of Carolina street 237½ feet west of the intersection of Carolina and Eighth streets 130 feet and runs back northward between parallel lines 170 feet. Also, nine $\frac{40}{100}$ acres of land, part of what is known as Ragland's tract, beginning at the northeast intersection of Grove avenue with Robeson street; thence north with Robeson street ave. 123 feet to a stake within 50 feet of the centre of the Memphis & Charleston Railroad; thence south 45° east with said railroad 559½ feet to Ragland street; thence south to the west side of said Ragland street 840 feet to Grove avenue; thence west *west* with the north side of Grove avenue 394 feet to beginning. Also, the lots described as follows, situate in the city of Memphis, county of Shelby, and State of Tennessee: Beginning at a point on the west side of Orleans 100 feet south of the intersection of the west side of Orleans street with the south side of a 20-foot alley which lies 177 feet south of Vance street, running thence southwardly with the west side of Orleans
131 street 131 feet to a stake; thence westwardly on a line parallel with said alley 131 feet to a 20-foot alley; thence northwardly on a line with said alley 181 feet to a stake: thence east on a line parallel with the first mentioned alley feet to the place of beginning on Orleans street; being lots No. 12 & 13, and part of the property heretofore conveyed by John Brown, &c.

Which said attachment was duly returned to and filed in the law court of Memphis on the morning of the first day of December, 1866, and said suit is still pending and undetermined in said court.

And afterwards, as appears in new rule docket 1432 of the records of the court, Autler & Schafer sued out in this court an attachment against said L. Kaufman; also as appears on new rule docket 1441, Carter, Kirtland & Co. sued out an attachment against said Kaufman; also, as appears by new rule docket 1429, George A. Davies & Co. sued out an attachment against L. Kaufman; also, as appears by new rule docket 1494, The Jackson Insurance Company, as well as John M. Davies & Co., sued out attachments against said L. Kaufman.

All said attachments, except the one sued out by your petition-
132 ers, were sued out in the honorable court, and each and every of them were filed in this court, and the levies thereunder made after the levy made under your orators' attachment.

Your orators state that it appears from the records that a reference was had in said causes, which had been consolidated, to the clerk and master, who reported the title to said property good, and of the value of $45,835.83, and that the indebtedness of Kaufman was as follows:

CHANCERY COURT.

Carter, Kirtland & Co.	8,475 31
I. Stellheimer	4,482 75
I. W. Sternbeck	2,335 50
Autler & Schaffer	645 50
Geo. A. Davies & Co.	5,748 98

LAW COURT.

Friedlander, Stix & Co..... 18,000 00

Your orators state that said L. Kaufman, after the filing of said attachments, filed in the United States district court for the district of West Tennessee a petition in bankruptcy, & was by said court adjudged a bankrupt on his said petition, and by said court W. Y. Cirode and N. Coronna were appointed assignees, and the aforesaid property was by said bankrupt placed in his schedules in said court, subject to
133 said attachments; but your orators are advised that none of the attaching creditors save themselves have proven their claims against said Kaufman in said bankruptcy court.

Your orators proved the amount of their claim in said court, but expressly reserved their said lien by virtue of their said attachment, and protested against a pro rata dividend with general creditors.

Your orators state that said property and other property has been advertised for sale, under the order of this court, on the first day of March, 1869.

Your orators state that they are informed that some or all of the attaching creditors claim that in some way their attachment is not good.

Your orators state that they were not made parties to said suit, although it appears said attaching parties knew of your orator's attachment, as a certified copy was used in this court on the hearing.

Your orators state that said property is about to be sold as if the title were clear, without reciting the lien of your orators; and they are advised that if the existence of said lien is known to bidders at said sale, it will deter them from bidding altogether, or cause them to bid
134 for a low sum, and enable the purchasers at said sale to come in this court and avoid his purchase, on account of the existence of said lien.

Your orators state that their claim is just, and that the attachment was properly sued out, and that said suit is still pending in said court.

Premises considered, your petitioners pray that the said sale, so far as the same relates to the property attached by your orators be pos'-poned; that your orators be made parties to the said consolidated suit, and permitted to establish their claim, and file their petition in said cause, in some reasonable time, to be by the court fixed, and have such orders, decrees and relief as shall to your honor seem equitable and just.

JOHN BULLOCK,
Sol. for Comp't.

L. Lithauer makes oath that the matters stated in the above and foregoing petition, so far as the same is stated of his own knowledge
135 is true, and those stated on the information of others he believes to be true.

L. LITHAUER.

Subscribed and sworn before me, Mar. 1st, 1869.

R. J. BLACK,
D. C. & M.

I decline making any order postponing the sale. The sale will proceed; and the compl't in this bill may file this, or a petition in the consolidated cases to establish his priority, if such exists, to the fund arising from the sale.

March 1st, 1869.

WM. M. SMITH,
Chancellor.

Report of sale.

Chancery court of Memphis.

JACOB STELLHEIMER & CO., ET ALS.
vs.
LOUIS KAUFMAN ET ALS.

In these consolidated cases the clerk and master begs leave to report that, in obedience to an order of sale herein at the November
136 term, 1868, of said court, after giving the required notice of the time, place, & terms of sale *of* advertisement &c., proceeded to sell at public , to the highest bidder, in front of the clerk & master' office in the city of Memphis, Tennessee, on Monday the first day of March, 1869, upon a credit of six, twelve, and eighteen months from the day of sale, taking from the purchasers notes with security, and retaining a lien upon the property, till the payment of the purchase money, as in said decree directed, the following described real estate, to wit:

Lot No. 10, on the north side of St. Charles street, fronting on said street 60 feet, and running back between parallel lines 148½ feet to an alley, as designated on Rucker & Parsons' subdivision of grounds of Wm. Conley when the same was struck off and sold to William Craig, bidding for Carter, Kirtland & Co., at and for the sum of seven hundred and fifty-five dollars ($755), his being the highest *b*and best bid therefor.

137 Lot No. 11, on the north side of St. Charles street, fronting on said street 60 feet and running back in parallel lines 148½ feet to an alley designated on Rucker and Parsons, subdivision of grounds for Wm. Conley, when the same was struck off and sold to William Craig, bidding for Carter, Kirtland & Co., at and for the sum of seven hundred and fifty-five dollars ($755), his being the highest and best bid therefor.

Lot No. 4, block 35 (34 on Todd and Grider's map of the city of Memphis), in the town of Fort Pickering, lying on the north side of Carolina street 237½ feet west of the intersection *and* Eig'th street, and fronting westwardly on Carolina street 100 feet, and running back between parallel lines 170 feet, when the same was struck off and sold to William Craig, bidding for Carter, Kirtland & Co., at and for the sum of one thousand and five dollars ($1,005), his being the highest and best bid therefor.

138 A tract of land containing 9.40 acres, being part of what is known as the Ragland tract, beginning at the northeast intersection of Grove avenue with Robeson, 1236 feet to a stake, within 50 feet of the Memphis and Charleston Railroad; thence south 45° east with said road 559½ feet to Ragland street; thence south with the west side of Ragland street 840 feet to Grove avenue, 394 feet to the beginning, when the same was struck off and sold to Barbour Lewis, bidding for Carter, Kirtland & Co., at and for the sum of ten thousand and five dollars ($10,005), his being the highest and best bid therefor.

Lot No. 6, on the plan of subdivision of F. S. Latham, C. M. Facker, and W. A. Jones, of lot No 3, in block 55, on the plan of South Memphis, and bounded as follows: Beginning at the northwest corner of said lot at the intersection of the south side of an alley, 20 feet wide, with the east side of Goslee street which is 30 feet wide, thence
139 southwardly with the east side of Goslee street 77 feet to the southwest corner; thence eastwardly 140 feet to the southeast

corner and to an alley 20 feet wide, thence northwardly with the west side of said alley 77 feet to the northeast corner and to the south side of the first named alley, thence westwardly with the south side of said alley 140 feet to the beginning, when the same was struck off and sold to W. M. Randolph bidding for I. M. Hill, at and for the sum of one thousand dollars ($1,000), his being the highest and best bid therefor.

A certain lot in South Memphis, beginning at a point on Orleans street, on the west side, 100 feet south of the intersection of the west side of Orleans street with the south side of a 20-foot alley which lies south of Vance street 177 feet; thence south with Orleans street 131 feet; thence west, parallel with said alley, 191 feet, to a 20 foot alley; thence north with said alley 131 feet to a stake; thence eastwardly to the beginning, being the same conveyed to defendant Kaufman
140 by J. H. Sonona, by deed of record in the register's office of Shelby County, Tennessee, in book 57, part 1, pages 637 & 638, when the same was struck off and sold to W. M. Randolph, bidding for I. M. Hill, at and for the sum of one thousand dollars ($1,000), his being the highest and best bid therefor.

A lot at the southeast intersection of Elliott and Causey streets in the city of Memphis, having a front of 125 feet on each of said streets, and being about square, in which lot the defendant, J. D. Williams, owns an interest of $\frac{677}{6000}$, which is not liable to the attachment in these causes; but which said Williams consented should be sold, when the same was struck off and sold to W. M. Randolph, bidding for I. M. Hill, at and for the sum of five hundred dollars ($500), his being the highest and best bid therefor.

The clerk and master further reports, that J. Stellheimer & Co., the Jackson Insurance Company, and John M. Davies & Co., to whom
141 the proceeds of the purchases of I. M. Hill, herein are going, have filed their receipt for twenty-five hundred dollars ($2,500), the amount of said Hill's purchase, less fifty-six & $\frac{40}{100}$ dollars ($56.40), which is the interest of J. D. Williams in the lot at the intersection of Elliott & Causey streets, and pray the court that a decree may be entered, divesting and vesting title to said property in the name said I. M. Hill. The amount due J. D. Williams, $56.40, they have paid into court.

Carter, Kirkland, & Co., purchasers of lots Nos. 10 & 11, on St. Charles street, and lot No. 4, block No. 35, and 940 acres, part of the Ragland tract, amounting in the aggregate to twelve thousand five hundred and twenty dollars ($12,520), have not as yet complied with the terms of sale; but through their solicitor express a desire and willingness to do so; and the notes for the full amount of the purchase have been forwarded to New York, to be executed by said purchasers.

142 RECAPITULATION.

I. M. Hill	2,500 00
Carter, Kirtland & Co	12,520 00
	$15,020 00

Respectfully submitted,

A. ALSTON. *C. & M.*,
By BENJ. COLEMAN, *D. C.*

MAR 27TH, 1869.

Proof debt without security by Friedlander, Stich & Co., New York, creditor.

In the district of the United States for the district of West Tennessee, in bankruptcy.

IN THE MATTER OF
LOUIS KAUFMAN, BANKRUPT.

SOUTHERN DISTRICT OF NEW YORK, *ss*:

At New York, in the county of New York and State of New York, on the 17th day of October, A. D. 1868, before me, John A. Osborn, U. S. commissioner, came Louis Friedlander, of New York, in the county of New York, in the State of New York, and made solemn oath, and who, after being duly sworn and examined at the time and place
143 aforesaid, upon his oath says that the said Louis Friedlander, the person by whom a petition for adjudication of bankruptcy has been filed, at and before the filing of the said petition, was, and still is, justly and truly indebted to this deponent, Julius Stich & Co., of New York, in the sum of twenty-three hundred and thirty-five dollars and fifty cents, with interest, from date of maturity on a promissory note dated August 31st, 1866, and signed L. Kaufman; consideration of said note was goods and merchandize sold to said bankrupt by deponent's firm; said note is hereto annexed, marked Exhibit A, for which said sum of twenty-three hundred and thirty-five dollars & fifty cents, with interest aforesaid, or any part thereof, this deponent says that he has not, nor has his firm, or any person by their order, or to this deponent's knowledge or belief, for his or their use, had or received any manner of satisfaction or security whatever; and this deponent further says that the said claim was not procured for the purpose
144 of influencing the proceedings under the act of Congress, entitled, "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867; that no bargain or agreement, express or implied, has been made or entered into by or on behalf of this deponent or his firm, to sell, transfer, or dispose of said claim or any part thereof, against said bankrupt, or to take or receive, directly or indirectly, any money, property, or consolidation whatever, whereby the vote of the deponent or his firm for assignee or any action on the part of this deponent or any other person in the proceedings under said act, has been, is, or shall be in any way affected, influenced, or controlled.

LOUIS FRIEDLANDER.

Subscribed and sworn to this 17th day of October, A. D. 1868, before me, and the foregoing proof is satisfactory to me.

JOHN A. OSBORN,
U. S. Commissioner Southern State of New York.

145 EXHIBIT A.

(Copy.)

$2,335.50.] NEW YORK, *Aug.* 31*st*, 1866.

Six months after date, promise to pay to the order of myself twenty-three hundred and thirty-five $\frac{50}{}$ dollars, at the Commercial Bank of Memphis, Tenn., with current rate of exchange on New York, value received.

(Signed) L. KAUFMAN.

I hereby certify the above and foregoing deposition of proof in the case of Louis Kaufman to be a full, true, and perfect copy of the original on file in my office in said cause, this Nov. 20th, 1868.

T. J. LATHAM,
Register in Bankruptcy for District of West Tennessee.

PROOF OF DEBT WITH SECURITY.

Deposition for proof of debt with security.

In the district court of the United States for the district of West Tennessee.

IN THE MATTER OF L. KAUFMAN, BANKRUPT. } In bankruptcy.

146 DISTRICT OF WEST TENNESSEE, *ss:*

At 450 Main street, Memphis, in the county of Shelby and State of Tennessee, on the 7th day of Oct., A. D. 1868, before me, T. J. Latham, register in bankruptcy of the district of West Tennessee, came L. Lithauer, of New York, in the county of New York, and State of New York, and made oath and says that the said L. Kaufman, the person by whom a petition for adjudication of bankruptcy has been filed, at and before the filing of the said petition was, and still is, justly and truly indebted to the firm of Friedlander, Stich & Co., of New York City and State, of which deponent is a member, in the sum of seventeen thousand seven hundred and nine dollars and seven cents, with six per cent. interest from the 7th day of September, 1866, for goods, wares, and merchandize sold and delivered, and that the whole amount is entirely due, owing, and unpaid; that on the 30th day of November, 1866, in the law court of Memphis, Friedlander, Stich & Co. sued out an
147 original attachment against the real estate mentioned in petitioner's Schedule B 1, which suit is still pending; and they claim the same as a prior lien on said real estate, for which said sum of seventeen thousand seven hundred and nine dollars and seven cents, or any part thereof, this deponent says he has not, nor has said firm, or any person by their order or to this deponent's knowledge or belief for their use, had or received any manner of satisfaction whatever.

These affiants protest against being treated as pro-rata creditors.

And this deponent further says that the said claim was not procured for the purpose of influencing the proceedings under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867; that no bargain or agreement, express or implied, has been made or entered into by or on behalf of this deponent, to sell, transfer, or dispose of said claim or any part thereof against said bankrupt, or to take or receive di-
148 rectly or indirectly, any money, property, or consideration whatever, whereby the vote of this deponent for assignee, or any action on the part of this deponent or any other person in the proceedings under said act has been, is, or shall be in any way affected, influenced, or controlled.

FRIEDLANDER, STICH & CO.,
By L. LITHAUER, *Deposing Creditor.*

the lien created by the levy of their said attachment on said property is in all respects valid, and, being prior in time, is prior and superior to the attachment liens of the defendants, or any of them, and should be first satisfied.

And it further appearing to the court that petitioners were not made parties, either complainant or defendant, to the attachment suit of said defendants in the said chancery court of Memphis, the court is of
156 opinion that they are not bound by the decrees of said court in said causes, nor by any sale or sales thereunder. And it further appearing to the court that said Carter, Kirtland & Co., who, by their agents, bid off the said lots or parcels of land firstly, secondly, and thirdly above described, and that said I. M. Hill, who, by his agent and attorney, bid off said lot fourthly above described, did so bid off said lots and parcels of land with full knowledge of the petitioners' prior thereon, with full knowledge of the said Kaufman's bankruptcy, with full knowledge that the complainants in said causes had not obtained the leave of this court to proceed to judgment, and with knowledge that the question of said Kaufman's discharge had not been determined by this court at the date of the decree under which said sale was made, the court is pleased to order, and adjudge, and decree that the said sales to said Carter, Kirtland & Co., and to said I. M. Hill, and their said purchases, so far as said sales and pur-
157 chases effect the property attached by petitioners, be set aside, and for naught held, and that possession of the same be given to defendant, W. Y. Cirode and N. Coronna, assignees of the said Kaufman as aforesaid.

And it further appearing to the court that the lien of petitioners upon said property is superior and prior to the liens of defendants as aforesaid, and that they are entitled to have the amount of their said judg-judgment, to wit, the sum of $19,311.81, with interest thereon from the 8th day of July, 1869, to be first paid and satisfied out of said property, or its proceeds, the court is pleased to order, adjudge, and decree that the said assignees, W. Y. Cirode and N. Coronna, after having taken possession of said above-described property as aforesaid, and after having given notice of the time and place of sale by advertisement published 30 days on one or more of the daily newspapers published in the city of Memphis, Tennessee, shall proceed to sell said above-described real estate to the highest and best bidder for one-third cash
158 and the rest in equal installments, payable in six and twelve months after the date of the sale, and shall make deeds of conveyance to the purchaser or purchasers, retaining a special lien therein for the balance of unpaid purchase-money, for which they shall require the notes of the purchaser or purchasers to be executed. Out of the proceeds of said sale the said assignees, after first paying the costs of this proceeding and of the sale, shall first pay to said petitioners, Friedlander, Stich & Co., or their attorneys, Messrs. Haynes & Stockton, the sum of $19,311.81, with interest thereon from the 8th day of July, 1869, and the remainder, if any, the said assignees shall pay to defendants George A. Davies & Co., Levi Dittleback & Loucheim, Antler & Shaffer, Carter, Kirtland & Co., J. Stillheimer & Co., the Jackson Insurance Company, and John M. Davies & Co., their agents and attorneys, in the order of their respective priorities, to such amount as the said bankrupt, Louis Kaufman, may be found to be indebted to them, and
159 the remainder, if any, to the general creditors of the said L. Kaufman, pro rata.

It is further ordered that the petitioners, Friedlander, Stich & Co., may bid and purchase at said sale, if they shall so desire, and may credit the amount of their said debt until the same shall be satisfied and exhausted, for which purchase or purchases, not exceeding in amount the amount of their said judgment and interest, the said assignees shall make to them, or to such persons as they may direct, deeds of conveyance. The said assignees will report to the next term of this court their action in the premises.

It is further ordered that the attorneys for petitioners, Messrs. Haynes & Stockton, shall have and retain a lien upon the recovery of petitioners and the proceeds of said property for their reasonable fee as such attorneys.

The defendants, except W. Y. Cirode and N. Coronna, assignees as aforesaid, pray an appeal from the above decree to the circuit
160 court of the United States, which is granted to them upon their executing their appeal bond, with approved securities, in the sum of $500, within the time prescribed by law, said securities to be approved by the clerk of this court.

Appeal bond.—Filed Febr'y 4, '73.

Circuit court of the United States, for the district of West Tennessee.

Know all men by these presents, that we, George A. Davies & Co., Levi, Dittleback & Loucheim, Carter, Kirtland & Co., J. Stellheimer & Co., the Jackson Insurance Company, and John M. Davies & Co., Ira M. Hill, Autler & Shaffer, and are held and firmly bound unto L. Friedlander, J. Stich, and L. Lithauer, of the city and State of New York, copartners in trade under the firm name of Friedlander, Stich & Co., in the sum of five hundred dollars, to be paid to said Friedlander, Stich & Co., to which payment, well and truly to be made we
161 bind ourselves and each of us, severally and jointly, and *one* and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 31st day of January, A. D. 1873.

Whereas the above-named George A. Davies & Co., Levi, Dittleback & Loucheim, Carter, Kirtland & Co., J. Stellheimer & Co., the Jackson Insurance Company, and Autler & Shaffer, John M. Davies & Co., and Ira M. Hill have prayed for an' obtained an appeal to said circuit court to reverse a judgment rendered by the district court of the United States for said district in an action wherein said Friedlander, Stich & Co. were plaintiffs, and George A. Davies & Co., Levi, Dittleback & Loucheim, Carter, Kirtland & Co., J. Stellheimer & Co., John M. Davies & Co., the Jackson Insurance Company, Autler & Shaffer, Ira M. Hill, and W. Y. Cirode, and N. Coronna, assignees in bankruptcy of one Louis Kaufman, were defendants.

Now, therefore, if the above-named George A. Davies & Co.,
162 Levi, Dittleback & Loucheim, Carter, Kirtland & Co., J. Stellheimer & Co., the Jackson Insurance Company, Autler & Shaffer, John M. Davies & Co., Ira M. Hill shall prosecute their said appeal to effect, and answer all costs and damages if they shall fail to

make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

GEORGE A. DAVIES & CO.,
By HENRY CRAFT, *Att'y at Law.*
LEVI, DITTLEBACK & LOUCHEIM,
By HENRY CRAFT, *Att'y.*
HENRY CRAFT, *Security.*
IRA M. HILL,
By W. M. RANDOLPH, *Att'y.*
J. STELLHEIMER & CO.,
By W. M. RANDOLPH, *Att'y.*
JOHN M. DAVIES & CO.,
By W. M. RANDOLPH, *Att'y.*
THE JACKSON INS. CO.,
By W. M. RANDOLPH, *Att'y.*
W. M. RANDOLPH, *Security.*
CARTER, KIRTLAND & CO.,
By W. M. RANDOLPH, *Att'y.*
AUTLER & SHAFFER,
By W. M. RANDOLPH, *Att'y.*
W. M. RANDOLPH, *Surety.*

163, 164, 165 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1872, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 7th day of February, A. D. 1873, in the following cause, to wit:

FRIEDLANDER, STICH & CO., PLAINTIFF,
vs.
GEORGE A. DAVIS & CO., DEFENDANT. } No. 195. Equity.

Transcript of record of district court filed on appeal.

166 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Novem. term, A. D. 1873, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 8th day of Decem., A. D. 1873, in the following cause, to wit:

FRIEDLANDER, STICH & CO, PLAINTIFF,
vs.
GEORGE A. DAVIS ET ALS., DEFENDANT'. } No. 195. Equity.

Be it remembered that the appeal in this cause from the decree of the district court of the United States, for the district of West Tennessee,

came on to be heard before the Hon. H. H. Emmons, circuit judge for the sixth circuit and for the district of West Tennessee, and it appearing to the court that the said complainant is justly entitled to a
167 lien upon all and singular the property in the bill described, and that upon the facts shown by the proof in the record and the claims of the counsel for complainant upon the agreement herein, the same was and is in the custody of the said district court, subject thereto, at the time of the sale in the said State court of chancery, and that such lien should be paid by the assignee, after a sale of said property, according to the course and practice of the court of bankruptcy, and that the unauthorized and mistaken appearance of said assignee in said State court and the decree therein in the circumstances made to appear herein, did not divest said lien or displace the priority thereof over the liens in the said State court of chancery enforced; but it further appearing to the court that the averments in said bill are insufficient to show fully why said assignees are made defendants, and are not complainants in this cause, and the court being of opinion that if such facts do
168 not exist, the said assignees should be complainants, by amendment of the bill, and that it should also set forth the reasons why they appeared in the State court, and why they did not therein defend and set up their rights as the representatives and trustees of the creditors of said bankrupt, and of the claims and liens of the complainants herein, and that it should further show, as the court here understands the facts are, that the purchasers under said sale in the State court were not third persons, strangers to said attachment proceedings, but bought as the agents of and for the plaintiffs in said attachment, and therefore subject to all and singular the equities of said original plaintiffs, who were bound by the rights and liens of the complainants in the bill set forth.

169 It is therefore considered that the said decree be reversed, and that the cause be remitted to the said district court, with the recommendation that said complainant be permitted to amend his bill, to amend his proof of the form of his debt by estimating the value of his security by attachment, and to amend all such other proceedings and to take such additional proceedings as may be necessary, according to the cause and practice of said district court, to enable the said complainant to secure his just rights as a prior attaching creditor of the property of said bankrupt under an attachment only levied more than four months before the filing the petition in the bill of complaint described.

170 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the district court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1875, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 23rd day of February, A. D. 1874, in the following cause, to wit:

FRIEDLANDER, STICH AND CO., PLAINTIFF,
vs. } No. 477.
GEORGE A. DAVIES AND CO., DEFENDANT.

In this cause, upon the production of the order of the circuit court of

the United States for the district of West Tennessee, remanding the same to the district court, for said, and upon application of the complainants, and the said order and decree of said circuit court being seen and understood by the district court, the court is pleased to order that said complainants be allowed to amend their bill and proceedings
171 in said cause as indicated in said order, and decree that they be permitted to so amend their proof of debt as to estimate therein the value of the security attached, and to make such other amendments, in said proceedings and proof of debt, as they may deem necessary to enable them to secure their rights as prior attaching creditors of said property.

172 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the district court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1876, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 28th day of June, A. D. 1876, in the following cause, to wit:

FRIEDLANDER, STICH & CO., PLAINTIFF,
vs.
GEORGE A. DAVIES & CO., DEFENDANT. } No.

In this cause, it is ordered that the petitioners be allowed to amend their original petition filed herein, on the 20th day of May, 1870, by inserting the following additional allegations or charges between the last charge or allegation thereof and prior.

Petitioners further state and charge that the purchasers, under said sale, made by the clerk and master of said chancery court, on the
173 1st day of Mar., 1869, were not third persons, strangers to said attachment suits, in said chancery court, but bid off said property, at said sale, as the agents and solicitors of and for complainants, in said attachment proceedings, and were therefore subject to all and singular the equities of said original complainants, who were bound by the rights and lien of the petitioners, as in the bill set forth; and if it should appear that said I. M. Hill purchased for himself, and not for the Jackson Insurance Company, one of said complainants, charge that he was the agent of said Jackson Insurance Company, though not the whole of said litigation, that he conducted the cause of said company for it; that he was an officer in said company, and therefore in like manner subject to all and singular of the equities, rights, and liens of petitioners, he having purchased with full knowledge of the
174 same, *hath* actual and constructive, and further that notice of petitioners' prior lien was publicly given to purchasers, bidders, and bystanders on the day and at the time of the sale. 2nd, petitioners further state, as they have been informed and believe, and so charge, the said W. Y. Cirode and N. Coronna, assignees of said L. Kaufman, were in same informed *way* notified by the solicitors of the said complainants that the said attachment suits in the said chancery court were being tried, and that they could become parties thereto if they so desire it; that after said notice came to the knowledge of said assignees, the regular solicitor of W. Y. Cirode, one of the assignees, Mr. Choate,

went to the said chancery court-room, where he found said attachment causes then being tried, and the trial so far in progress that
175 he could then neither stop the same nor interpose any defense, if any were necessary. Upon being informed by the solicitors of said complainants that the only interest that said assignees could possibly have in the result was to claim such surplus as might remain after the disposal of the causes thereon, to wit, the said solicitor not having had time to examine any of the processes or pleadings in said causes, and with the district understanding that said assignees should be in no way prejudiced thereby in any defence they might or should have made, consented to a lien, becoming nominal parties defendant, and an order to this effect was accordingly entered. Petitioners state that, being citizens of the State of New York, they did not neither could they know anything of said proceedings, and, as they have since been informed, neither did their solicitor, John Bullock, esq. But they insist that said proceeding can in no event in any way effect them or their rights, as they were prior lien creditors by virtue of proceedings in another cause, and were not parties to said causes in fact,
176 as was well known to the solicitors for said complainants (the defendants to this petition). The court specially reserved all rights and priorities to the petitioners by adding to its decree, as prepared by one of said complainants' solicitors, the following words: "The foregoing decree is not intended to effects the rights of any person or persons not before the court, but the rights of all persons are saved to them respectively," intending thereby to save rights of petitioners especially. Petitioners further state that they are advised that said assignees were invested with the estate of said Kaufman, the bankrupt, subject to the valid lien of complainant, and no divestiture of said estate could be made by any State tribunal out of said assignees so far as to in any way effect these petitioners in any cause to which they were not a party. Only such estate as said assignees have and in such quantity could be divested even if they had been proper parties to said proceedings
177 by proper process. If the estate was divested out of them it could only be divested subject to the lien of petitioners, who, as aforesaid, were the parties to said cause, and besides petitioners insist that they should not be prejudiced in their rights by the accident of a decree hurried and forced upon said assignees, with no time given to prepare their proper defences, and by the utter mistake of the said solicitor for Cirode, arising from the aforesaid representation to him that the assignees were in no manner interested in the event of said cases, except as to what surplus might remain. Petitioner further states that upon the said decree coming to the knowledge of their attorney, John Bullock, esq., he made application to the chancellor of said court to stop said sale as gently detrimental and injurious to the rights of petitioners, but said application was in no way acted upon save that said chancellor peremptorily refused to stop the sale; the only course then left to petitioners was to ask the relief of this honorable court in estab-
178 lishing their prior lien as aforesaid.

3. It is further ordered that petitioners be allowed to amend their pro'ff of debt with security filed in this cause by more specifically stating and showing the property attached and claimed as security, as also the estimated value thereof, which said amendment is accordingly made by inserting in said proof of debt with security immediately after the words "the real estate mentioned in petitioners Schedule B 1" the following words: "which is described as follows, to wit: Lots 10 and 11, on the north side of St. Charles street, in the city of Memphis,

such lots fronting on said street 60 feet, and running back between parallel lines 148½ feet to an alley, as designated on Packer and Perrin's subdivision of ground for Wm. Corley. Also lot No. 4, in block 35 (No. 34, in Todd and Curtiss' map of the city of Memphis), in the town of Fort Pickering, said lot lying on the north side of Carolina street and 8th street, and fronts southwardly on said
179 Carolina street 130 feet, and running back northwardly between parallel lines 170 feet. Also nine $\frac{40}{100}$ acres of land, part of what is known as the Ragland tract, beginning at the N. W. intersection of Grove avenue with Robinson street, 1,236 feet to a stake within 50 feet of the center of the Memphis & Charleston Railroad, 559½ feet to Ragland street; thence south with the west side of said Ragland street 840 feet to Grove avenue; thence with the north line of Grove avenue 394 feet to the beginning, and also the lots situated in said county and city, beginning at a point on the west side of Orleans street with the south side of a 20-foot alley, which lies 177 feet south of Vance street, running thence southwardly with the west side of Orleans street 131 feet to a stake; thence westerly on a line parellel with said alley 191 feet to a 20-foot alley; thence northern line with said alley 131 feet to a stake; thence east on a line parallel with the first mentioned
180, 181 alley to the beginning on Orleans street, being lots No. 12 & 13 on part of the property before conveyed to F. M. Cash by John Brown, said property being of the estimated value of forty-seven thousand dollars, ($47,000.00), that being the estimate placed upon the same by said bankrupt in his schedules."

The defendants, other than the assignees in bankruptcy of L. Kaufman, object to the foregoing several orders, and the several amendments therein permitted, and by leave of the court here enter and note their exceptions, and the said defendants other than the assignees in bankruptcy now come and file their answers to said amendments, and by consent of the parties in open court it is ordered that the answers of said assignees, Cirode and Coronna, to the original petitions shall be taken as an answer *as an answer* to the amended petition.

182 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the district court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1876, at the United States court-house, in the city of Memphis, in said district, on to wit, the 28th day of June, A. D. 1876, in the following cause, to wit:

FRIEDLANDER, STICH & CO., PLAINTIFF,
vs.
GEORGE A. DAVIES & C'., & OTHERS, defendant. } No. .

The joint and several answer of I. M. Hill, George A. Davis & Co., Levi, Dittleback & Louscheim, Autler, Shaffer, Carter, Kirtland & Co., J. Stellheimer & Co., The Jackson Insurance Company, and John M. Davis & Co., for the amendment this day allowed against the objection of the defendants to the petition of the plaintiffs.

Respondents here severally adopt and repeat their answers formerly

filed, and pray the same benefit thereof as if their statements
183 were here repeated. And for answer to such parts of the said amendments as are not answered by the said answers, respondents say that respondent I. M. Hill was a stockholder and an officer of the Jackson Insurance Company when he made the purchase stated in the original answer.

And further, that he made the said purchase for the benefit of his confederates, J. Stellheimer & Co, the Jackson Insurance Company, and John M. Davies & Co., and that he now holds the title to the said property so purchased by him in trust for the said defendants, in the order in which under their several attachments they are entitled to priority in or to the said property. The purchase money was paid by him as such trustee, as stated in his original answer, by crediting the amount thereof on the debts due the said parties, respectively, from the said L. Kaufman, as established by the decree, being the same debts that the
184 said property was sold to pay, and by such purchase respondents insist that the said Ira M. Hill acquired and now has and holds the title for the said property free and discharged from all claims and liens of the plaintiffs and all other persons, except the defendants for whom he is trustee.

The manner in which the said Cirode and Coronna, as assignees in bankruptcy of the said L. Kaufman, applied to become and were made parties defendant to the suit in chancery in the State court of J. Stellheimer & Co. and others, vs. L. Kaufman and others, is, as stated in the original answers of these respondents, and as shown by the proof already taken, and all the statements of the said amendment that contradict or vary from the facts as stated by the said answers and the proof are hereby positively and explicitly denied. The said assignees had every opportunity to make defense in the said chancery suit that
185 they could have desired, and were not forced into trial without opportunity to be heard.

These respondents deny that any representations were made by these or any of them, or their solicitors or any of the parties to the said chancery suit, or their solicitors, to the said assignees or their solicitors, tending or calculated to induce the making of the said assignees parties to the said suit, nor was there any understanding or agreement between them or any of them or their solicitors and the said assignees or their solicitors as the necessity of their being made parties to the said suit in chancery or the effect of their being made parties.

The whole that transpired in reference to the making of the said assignees parties to the said suit stated in and shown by the record in evidence in this cause. And respondents here deny every statement in the said amendment not supported by the said record, and say
186 that the record concludes the said assignees effectually according to its tenor.

And respondents say it was proper for the said assignees to make themselves parties to the said chancery suit, and they are advised that the only way in which the said assignees could have had the benefit of any claim they had to the said property was by making themselves parties to the said suit.

If the plaintiffs have any rights to the property herein involved which it is not necessary for them to assert through the said assignees in bankruptcy and such rights have not already been passed on by the said State chancery court, then respondents say and submit that the said State chancery court has jurisdiction to adjudicate the same, and that this court has no jurisdiction in the premises.

And all the other matters of the said amendment not already answered are hereby denied.

And respondents as to all the matters of the said amendment
187 here plead and rely upon (1) the lapse of three years and six years from the accruol of the cause of action to the plaintiffs or the assignees in bankruptcy of the said L. Kaufman, as a complete defense to the relief prayed under the statutes of the State of Tennessee in that behalf in force, and (2) the statute of the United States requiring all suits by or on behalf of assignees in bankruptcy to be brought within two (2) years from the appointment, &c., of the assignee, and crave the same benefit thereof as if such pleas were separately interposed.

And respondents here adopt, rely upon, and respect their demurrer to the original petition, and pray that the same may be taken and considered as a demurrer to the said amendment or to the petition as amended, and that they may have the benefit thereof.

And having, &c.

RANDOLPH, HAMMOND & JORDAN,
KORTRECH & CRAFT, &
BARBOUR LEWIS.

For Deft's.

Oaths waived.

188 STOCKTON & HAYNES,
Sol's for Petitioners.

(Endorsed:) No. 477. Friedlander, Stich & Co. vs. George A. Davis & Co. Answer of def'ts. Filed June 28, 1876. H. E. Andrews, clerk.

189 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the district court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1876, and at the United States court-house in the city of Memphis, in said district, on, to wit, the 29th day of June, A. D. 1876, in the following cause, to wit:

FRIEDLANDER, STICH & CO., PLAINTIFF,
vs.
GEORGE A. DAVIS AND CO., ET ALS, DEFENDANT. } No.

Be it remembered that this cause came on to be heard on the original petition and the amendments thereto, exhibit, answers of defendants to original petition and the amendments thereto, and agreement of counsel & report of register, and the proofs on file in the cause; from all which, it appears to the court that Louis Kaufman filed in this court on the
190 30th day of May, 1868, a voluntary petition to be declared a bankrupt; that on the 14th day of July, 1868, said Kaufman was adjudicated bankrupt, and received his discharge on the 24th day of March, 1869. It further appears to the court, that more than four months previous to the filing of said petition by said Kaufman, to wit, on the 30th day of November, 1866, the petitioners, Friedlander, Stich & Co., being at the same time creditors of the said Kaufman, sued out an attachment against him under and by virtue of the laws of Tennessee, which said attachment was, on said 30th day of November, 1866, duly levied upon the following real estate of said Kaufman, lying in the

county of Shelby, and State of Tennessee, to wit: Lot 10 and 11 on the north side of St. Charles st., in the city of Memphis, each lot fronting on said street 60 feet and running back between parallel lines one hundred and forty-eight and ½ feet (148½) to an alley as designated on Packer and Persons' subdivision of grounds for Wm. Conley. Also, lot No. 4, in block 35; No. 34, in Todd's and Crider's map of the city of
191 Memphis, in the town of Fort Pickering, said lot lying on the north side of Carolina street, 237½ feet west of the intersection of Carolina and Eight' streets, and fronts southwardly on said Carolina street 130 feet, and running back northwardly between parallel lines 170 feet. Also nine & $\frac{40}{100}$ acres, part of which is known as the Ragland tract, beginning at the north-west intersection of Grove avenue with Robinson street; thence north with Robinson street 1,236 feet to a stake within fifty feet of the centre of the Memphis & Charleston Railroad; thence south 450 feet with said railroad, 559½ feet to Ragland street; thence south with the west side of said Ragland street, 840 feet to Grove avenue; thence with the north line of Grove avenue, 394 feet to the beginning; and also the lots situated in said county and city beginning at a point on the west side of Orleans st., with the south side of a 20-foot alley, which
192 lies 177 feet south of Vance street, running thence westerly, on a line parallel with said alley, 191 feet west to a 20-foot alley; thence north 131 feet; thence east on a line parallel with the first mentioned alley to the beginning on Orleans street, being lots twelve and thirteen, on part of the property conveyed before to F. M. Cash by John Brown. It further appears to the court, that said attachment and levy were duly returned to the law court of Memphis (a court competent to take jurisdiction of the same) on the first day of December, 1866, and that the petitioners, having first obtained leave on the 8th day of April, 1869, to proceed to judgment in said cause, did so proceed to judgment and verdict, and judgment were on the 8th day of July, 1869, duly rendered by said court in their favor against said Kaufman, in the sum of nineteen thousand three hundred and eleven and $\frac{80}{100}$ dollars, ($19,311.80) and a venditioni exponas granted, but by the order of said court suspended and stayed until the further order of the court. It further appears to the
193 court that at the date of the rendition of said judgment the said law court of Memphis had competent jurisdiction to render the same, and that thereby the attachment lien of said petitioners upon said property became perfect, relating back to the date of its levy, to wit, the aforesaid 30th day of November, 1866, and is prior and superior to all decrees and judgments obtained by the defendant upon attachments levied subsequently to said 30th day of November, 1866. It further appears to the court that defendants George A. Davis & Co., creditors of said Kaufman, filed their attachment for their debts, to be levied upon said property or a portion thereof on the first day of December, 1866; defendants Levi, Dittleback & Loucheim and Autler & Shaffer, on the fourth day of December, 1866; defendants on the fifth day of December, 1866; defendants J. Stellheimer & Co., (in whose suit the defendants the Jackson Insurance Co., through its treasurer, defendant I. M. Hill, intervened on the 9th day of August; and the defendants John M. Davis & Co., on the 22d day of January, 1868), on
194 the 28th day of December, 1866, filed their attachment bills in the said chancery court and levied attachments for their debts due from said Kaufman upon said property or a portion thereof, and without having first applied for or obtained leave from this court, proceeded to judgment in said causes. they having been therefore consolidated, and on the 16th day of December, 1868, obtained a decree from said chan-

cery court of Memphis for their debts and for a sale of said property to satisfy the same, all previous to the questions of said Kaufman's discharge being determined by this court, of which the said defendants had full notice. It further appears to the court that, under and by virtue of said chancery court of Memphis, did, on the first day of March, 1869, proceed to sell said property, and the lots and tracts thereof, firstly, secondly, and thirdly above described were bid off for defendants Carter, Kirtland & Co., by their agents and attorneys Lewis & Craig, and that said Carter, Kirtland & Co., have failed to
195 comply with the terms of said sale; that the lot on Orleans st., fourthly above described, was bid off for defendant I. M. Hill, by his agent & attorney W. M. Randolph, esq., and that on the third day of April, 1869, the said I. M. Hill, by his agent and attorney W. M. Randolph, esq.; and that on the third day of April, 1869, the said I. M. Hill obtained a decree from said court divesting the title of said lot out of all the parties to said suit and vesting the same in him, the said Hill. It further appears to the court that the defendant W. Y. Cirode and N. Coronna were duly appointed assignees in bankruptcy of said L. Kaufman, bankrupt, by this court on the 12th day of March, 1868, and that there has been as yet no final disposition of the assets of said bankrupt, nor any final settlement of the rights, demands, claims, and liens of his creditors by this court, nor any final settlement or discharge of said assignees.

It further appears to the court that the petitioners sued out their said attachments and levied the same on said 30th day of Novem-
196 ber, 1866, and obtained their said judgment without any fraudulent collusion or combination between them and the said Kaufman or any one else; that their claim against said Kaufman was honest and bona fide, and that the lien created by the levy of their said attachment on said property is in all respects valid, and being prior in time, is prior and superior to the attachment liens of the defendants or any of them, and should be first satisfied. And it further appearing to the court that petitioners were not made parties, either complainant or defendant, to the attachment suits of said defendant, in said chancery court of Memphis, the court is of the opinion they are not bound by the decrees of said court in said causes, nor by any sales or sale made thereunder.

And it further appearing to the court that said Carter, Kirtland & Co., who by their agents bid off the said lots or parcels of land, firstly, secondly, and thirdly *of one* described, and that said I. M. Hill,
197 who by his agent & attorney bid off said lot fourthly above described, did so bid off said lots and parcels of land with full knowledge of the said Kaufman bankrupt; with full knowledge that the complainants in said cause had not obtained the leave of this court to proceed to judgment, and with full knowledge that the questions of said Kaufman's discharge had not been determined by this court at the date of the decree under which said sale was made, the court is pleased to order, adjudge, and decree that the, said sale to said Carter, Kirtland & Company, and to said I. M. Hill and their said purchases, so far as said sales and purchases affect the property attached by petitioner, be set aside and for naught held, and that possession of the same be given to defendant, W. Y. Cirode and N. Coronna, assigns of the said Kaufman as aforesaid.

And it further appearing to the court that the lien petitioners upon the said property be superior and prior to the liens of defendants as aforesaid, and that they are entitled to have the amount of their judg-

ment, to wit, the sum of nineteen thousand three hundred and eleven ($19,311.81) dollars and eighty-one cents, with interest from the 8th day of July, 1869, to be first paid and satisfied out of said property and its proceeds, the court is pleased to order, adjudge, and
198 decree that the said assignees, W. Y. Cirode & N. Coronna, after having taken possession of said above described property as aforesaid, and after having given notice of the time and place said sale by advertisement published thirty days in one or more of the daily newspapers published in the city of Memphis, Tennessee, shall proceed to sell above described real estate to the highest bidder and best bidder for cash, and the rest in equal installments, payable in six and twelve months after the date of the sale, and shall make deeds of conveyance to the purchaser or purchasers retaining a special lien thereon for the balance of unpaid purchase money, for which they shall require the notes of the purchaser or purchasers to be executed. Of the proceeds of said sale the said assignees, after first paying the costs of this proceeding, and after sale shall first pay to said petitioners, Friedlander, Stich & Co., or their attorneys, Haynes & Stockton, the sum of nineteen thousand three hundred and eleven $\frac{81}{100}$ dollars ($19,311.81), with interest there on from the 8th day of July, 1869, and the remainder, if any, the said assignees shall pay to the defendants, Geo. A. Davies & Company, Levi, Dittleduck, Loucheim, Autler, and Schaffer, Carter, Kirtland & Company, J. Stellheimer and Co., the Jackson Insurance Company, and
199 John M. Davies & Company, their *and* attorneys in the order of their respective priorities, to such amounts as the said bankrupt Louis Kaufman be found to be indebted to them; and the remainder, if any, to the general creditors of the said L. Kaufman pro rata. It is further ordered that the petitioner, Friedlander, Stich & Co., may bid and purchase at said sale, if they shall so desire, and may credit the amount of their purchase or purchases upon this said debt until the same shall be satisfied and exhausted, for which purchase or purchases not exceeding in amount the amount of their said judgments and interest the said assignees shall make to them or to such persons as they may direct deeds of conveyance. The said assignees will report to the next term of this court their action in the premises. It is further ordered that the attorneys for the petitioner, Mes's. Haynes & Stockton shall have and retain a lien upon the recovery of petitioner, and the proceeds of said property for their reasonable fee as such attorneys. All the defendants except W. Y. Cirode, N. Coronna, *defendant* in bankruptcy of L. Kaufman, pray an appeal from the above decree to the circuit court of the United States for the district of West Tennessee; and having executed and appeal bond, conditioned according to the law, in the penalty of two hundred and fifty, with securities
200 which are proved as good and sufficient, the said appeal is hereby granted thus; and by agreement of parties, it is further ordered that the clerk in making the transcript for the circuit court on the said appeal shall copy only the proceedings that have been had, and the pleadings that have been filed since the cause was remanded to this court from the circuit court, and that the transcript sent upon the former appeal shall establish a part of the record on the present appeal.

Appeal bond.

Circuit court of the United States, for the district of West Tennessee.

Know all men by these presents that we, George A. Davies & Co., Levi, Dittleback and Lonchiem, Carter, Kirtland & Co., J. Stellheimer

& Co., The Jackson Insurance Company, and John M. Davis and Co., Ira M. Hill, and Autler & Schaffer are held and firmly bound unto L. Friedlander, J. Stich, & L. Lithaner, of the city and State of New York, copartners in trade under the firm name of Friedlander, Stich & Co., in the sum of two hundred & fifty dollars, to be void on condition that, whereas the above-named obligors have obtained an appeal to the circuit court of the United States for the district of West
201 Tennessee, to reverse a judgment rendered by the district court of the United States for said district, in a proceeding wherein the said Friedlander, Stich & Co. are plaintiffs, and the said obligors, W. Y. Cirode and N. Coronna, as assignees in bankruptcy of one Louis Kaufman, were defendants.

Now, therefore, if the said appel'ants shall prosecute their said appeal to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise it shall remain in full force and virtue. Done this 29th day of June, 1876.

GEO. A. DAVIES & CO.,
By W. M. RANDOLPH, *Att'y.*
LEVI, DITTLEBACK & LONCHEIM,
By W. M. RANDOLPH, *Att'y.*
J. STELLHEIMER & CO.,
By W. M. RANDOLPH, *Att'y.*
JNO. M. DAVIES & CO.,
By W. M. RANDOLPH, *Att'y.*
JACKSON INSURANCE CO.,
By W. M. RANDOLPH, *Att'y.*
CARTER, KIRTLAND & CO.,
By W. M. RANDOLPH, *Att'y.*
AUTLER & SCHAFFER,
By W. M. RANDOLPH, *Att'y.*

We, the undersigned acknowledge ourselves parties to the foregoing bond, and bound, as sureties of the said appelants, by all its terms and provisions.

June 29th, 1876.

W. M. RANDOLPH.
HENRY CRAFT.

Approved by me this 30th day of June, 1876.

H. E. ANDREWS, *Clerk.*

(Endorsed as follows:) No. 477. Friedlander, Stich & Co. vs. Geo. A. Davies & others. Appeal bond. Filed June 29th, 1876. H. E. Andrews, cl'k. L. H. Pillsbury, D. C.

202 UNITED STATES OF AMERICA,
Western District of Tennessee.

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof begun and held for its Nov. Term, A. D. 1877, at the United States court-house in the city of Memphis, in said district, on to wit, the 23rd day of January, A. D. 1878, in the following cause, to wit:

FRIEDLANDER, STICH & CO., PLAINTIFF,
vs.
GEORGE A. DAVIS ET ALS., DEFENDANT. } Equity. No. 393.

Transcript from district court refiled.

203 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court at a regular term thereof begun and held for its Nov. term, A. D. 1877, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 8th day of Feb'y, A. D. 1878, in the following cause, to wit:

FRIEDLANDER, STICH AND CO., PLAINTIFFS,
vs.
GEO. A. DAVIS & CO. ET ALS., DEFENDANT. } Appeal. No. 303.

This cause came on to be heard on the 8th day of February on appeal from the U. S. district court for the western district of Tennessee, and after argument of counsel and upon inspection of the transcript of the record, the court being of opinion there is no error in the decree of said district court entered upon the 29th day of June, 1876, it is ordered by
204 the court that said decree be affirmed, and that the cause be remanded to said court for the execution of said decree. It is further ordered that the costs of their said appeal be paid by the appellants and the sureties, W. M. Randolph and Henry Craft, on their appeal bond, for which let execution issue. And thereupon defendants, other than Cirode and Coronna, as assignees in bankruptcy of Louis Kaufman, come and pray an appeal from the decree herein rendered to the next term of the Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1878, and such appeal is hereby granted them, and sixty days are allowed them within which to give the appeal bond required by law, and the amount of such bond is fixed at the sum of five hundred dollars, and the clerk of the court will approve the security.

205 Supreme court of the United States.

Know all men by these presents that we, George A. Davis and Co., Levi, Dittlebach and Loucheim, Carter, Kirkland and Co., J. Stellheimer and Co., Jackson Ins. Co., Ira M. Hill, Autler & Schaffer, John M. Davis & Co., and W. M. Randolph, Henry Craft, as sureties, are held and firmly bound unto L. Freidlander, Julius Stich and L. Lithaler partners as Friedlander, Stich and Co. in the sum of five hundred ($500) dollars, to be paid to the said Friedlander, Stich and Co., executors or administrators; to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals, dated this 26th day of March, 1878.

Whereas the above-named George A. Davis and Co. and the other aforesaid obligors have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-enti-

tled action by the circuit court of the United States for the western district of Tennessee.

Now, therefore, the consideration of this obligation is such that if the above-named George A. Davis and Co. and the other obligors shall prosecute said writ of error appeal to effect, and answer all costs and damages if they shall fail to make good their plea then this obligation shall be void; otherwise to remain in full force and virtue.

GEO. O. DAVIS & CO.
LEVI, DITTLEBACH & LOUCHEIM.
CARTER, KIRTLAND & CO.
AUTLER & SCHAFFER.
By HENRY CRAFT, *Att'y.*
HENRY CRAFT, (*Surety.*)
J. STELLHEIMER AND CO.
JACKSON INS. CO. [SEAL.]
IRA M. HILL, AND
JOHN M. DAVIS & CO, AND [SEAL.]
CARTER, KIRKLAND AND CO.
By WM. M. RANDOLPH, *Atty.* [SEAL.]
WM. M. RANDOLPH, (*Surety.*)

Acknowledged before me this 29th day of March, 1878.

[L. S.] H. E. ANDREWS, *Clerk.*
L. H. PILLSBURY, *D. C.*

206 (Endorsed:) No. 303. Circuit court of the United States, western district of Tennessee. Friedlander, Stich and Co. vs. Geo. A. Davis and Co. et als. Appeal bond to United States Supreme Court. Filed the 29th day of March, A. D. 1878. H. E. Andrews, clerk, L. H. Pillsbury, D. C.

207 THE UNITED STATES OF AMERICA,
Sixth Circuit and District of West Tennessee:

I, Horace E. Andrews, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the paper hereto attached is a full, true, perfect, and correct copy of the original record and proceedings in said court, as the same now appear of record, and upon the files in my office, in the following cause, to wit: Friedlander, Stich and Co. vs. Geo. A. Davis and Co. et als.

In testimony whereof, I have hereunto set my name and affixed the seal of said court, at office, in the city of Memphis, this 18th day of May, A. D. 1878, and of the Independence of the United States the 102d year.

[SEAL.] H. E. ANDREWS, *Clerk.*
L. H. AILLSBURY, *D. C.*

(Indorsed:) No. 302, eq. cir. court of the United States, district of West Tennessee. Friedlander, Stich & Co. vs. Geo. H. Davis and Co., et als.

(Indorsement on cover:) No. 170. George A. Davis & Co. et al., appellants, vs. L. Friedlander, Julius Stich & L. Lithauer, partners, as Friedlander, Stich, & Co. W. Tennessee, C. C. U. S. Filed 14th March, 1879.

SUPREME COURT U.S.
FILED
DEC 1 1881
CLERK

In Supreme Court of the United States

OCTOBER TERM, 1881.

GEORGE A. DAVIS AND OTHERS, *Appellants*,
—vs.—
LOUIS FRIEDLANDER AND OTHERS, *Appellees*. } No. 170

Statement of Case, Assignment of Errors, and Brief

—OF—

WM. M. RANDOLPH,

OF COUNSEL FOR APPELLANTS.

S. C. Toof & Co., Printers, Memphis, Tenn.

In Supreme Court of the United States

OCTOBER TERM, 1881.

GEORGE A. DAVIS AND OTHERS, *Appellants*,
—vs.—
LOUIS FRIEDLANDER AND OTHERS, *Appellees*. } No. 170

STATEMENT OF CASE, ASSIGNMENT OF ERRORS, AND BRIEF FOR APPELLANT.

FACTS.

On the 1st December, 1866, George A. Davis & Co. filed an attachment bill in the Chancery Court of Memphis against Louis Kaufman, and had an attachment issued and levied.

On the 3d December, 1866, Levi, Dittlebach & Louchheim and Antler & Shaffer filed a similar bill against the same defendant in the same court, and had a writ of attachment issued and levied.

On the 5th December, 1866, Carter, Kirtland & Co. filed the same kind of bill against the same defendant, and likewise had a writ of attachment issued and levied.

On the 27th December, 1866, J. Stettheimer & Co. filed in the same court their attachment bill against the same defendant, and had an attachment issued and levied.

On the 9th January, 1867, the Jackson Insurance Company, and on the 22d January, 1868, John M. Davies & Co., by petition filed in the cause, made themselves parties to the suit of J. Stettheimer & Co. as coplaintiffs, and had a

writ of attachment issued and levied on additional property.

Record pp. 18 and 19–20.

All these bills, besides being general attachment bills, were filed under the provisions of the Code of Tennessee, sec. 4288 and following, for the purpose of setting aside certain conveyances made by Kaufman, which were charged to have been made to hinder, delay and defraud his creditors, and to subject the property attached to the payment of his debts.

Record p. 19.

All these causes were consolidated.

Louis Kaufman on the 30th day of May, 1868, filed his voluntary petition in the District Court of the United States for the District of West Tennessee, and was adjudged bankrupt, and William Y. Cirode and Nathan Coronna were appointed his assignees in bankruptcy, and qualified as such.

Record pp. 4, 14.

On the 18th November, 1868, notice in writing was given Cirode and Coronna as assignees in bankruptcy that the above consolidated suits were pending in the chancery court of Memphis against the said Kaufman, and that if they chose to defend the same they could do so immediately.

Record p. 21.

Thereupon Cirode and Coronna appeared in the consolidated causes in the chancery court, and by their consent, and the consent of all the parties, they as assignees of Kaufman were made parties defendant, with all the benefit of any defense they might at any time have had in any manner as such assignees, they assenting that the hearing should then proceed.

Record pp. 20 and 22.

On the 16th December, 1868, the consolidated causes were heard on bills, answers, proofs, &c. Certain of the conveyances of Kaufman, attacked by the bills as fraudulent, were sustained by the decree of the court, and the bills as to the property embraced in them were dismissed. All the plaintiffs were adjudged to be entitled to recover their respective debts, the amounts of which were fixed in the decree, and judgments pronounced against Kaufman accordingly.

The property attached in the above consolidated suits, except that mentioned above, was thereupon decreed to be subject to the attachments, and was ordered to be sold by the Clerk and Master, and the rights and priorities of the several plaintiffs as among themselves were fixed and declared. And it was ordered that the residue of the proceeds of the sale of the property decreed to be sold, after paying the debts to be paid under the decree, be paid to the defendants Cirode and Coronna as the assignees in bankruptcy of the said Kaufman.

Record pp. 22–27.

The Clerk and Master, under the decree, advertised the property to be sold on the 1st March, 1869. On that day, and before the sale, Friedlander, Stich & Co., the present appellees, appeared in the chancery court of Memphis and under an order of the court filed their petition in the above consolidated causes, setting up that on the 30th November, 1866, and before the bringing of any of the suits in the chancery court of Memphis, before mentioned, or the levy of any of the attachments in those suits, they had sued out an attachment before a Justice of the Peace of Shelby county, Tennessee, against the said Kaufman, made returnable to the Law court of Memphis, and had caused it to be levied on the property attached in the consolidated suits, that the said attachment was good and effectual to bind the property levied on, and was a prior lien thereon to the attachments of the creditors who had attached in the Chan-

cery court of Memphis in the said consolidated causes, whose attachments were severally stated in the said petition. The petition also stated Kaufman's bankruptcy and the appointment of Cirode and Coronna as his assignees, and that Friedlander, Stich & Co. had proved their debt in bankruptcy, claiming the benefit of their lien under their attachment, but the other attaching creditors had not proved their debts in bankruptcy.

The petition then stated that the attaching creditors in the chancery court denied the validity of the attachment of Friedlander, Stich & Co.; that Friedlander, Stich & Co. had not been made parties to the suits in the chancery court, and that a sale of the property, by reason of their lien and claim, would not pass the title to the purchaser.

The prayer of the petition was that the sale advertised by the Clerk and Master might be postponed, that Friedlander, Stich & Co. be made parties to the said consolidated suits, and be permitted to establish their claim and file their petition in the said cause, and have such orders, decrees and relief as should seem equitable and just.

Upon consideration of the petition the chancery court ordered that the sale would not be postponed, but would proceed, and that Friedlander, Stich & Co. might file their petition in the consolidated causes to establish their priority, if such existed, to the fund arising from the sale.

Record pp. 20, 27–29 and 39–41.

The Clerk and Master thereupon proceeded to sell the property under the decree of 16th December, 1868, and made a report of his sales to the court, and such report was confirmed.

Record pp. 29–31, and 42–43.

Ira M. Hill, the purchaser of a part of the property, fully complied with the terms of the sale, and the title to such property was by the decree of the chancery court pro-

nounced on the 27th March, 1869, divested out of each and every party to the suit, and was vested in the said Hill, his heirs and assigns.

Record pp. 30–31.

This decree was pronounced after Friedlander, Stich & Co., as well as Cirode and Coronna, as Kaufman's assignees in bankruptcy, had been made parties to the consolidated suits as already shown.

The final disposition made by the chancery court of the other property decreed by it to be sold, and bought at the sale by Carter, Kirtland & Co., or whether it has disposed of the same under its decree, or the decree remains unexecuted as to it, does not appear in this record—the bidders, as appears by the Clerk and Master's report, not having complied with the terms of the sale.

Record pp. 42–43.

On the 20th August, 1870, Friedlander, Stich & Co. filed their petition in the District Court of the United States for the District of West Tennessee sitting in bankruptcy. It stated their attachment against Kaufman, that after obtaining the leave of the court in bankruptcy they had on the 8th July, 1869, obtained a judgment in their suit against Kaufman in the law court of Memphis, and that the property attached had been ordered to be sold to satisfy the judgment, but as Kaufman had previously obtained his discharge in bankruptcy it was ordered by the said law court that the sale under the order be suspended and stayed till the further order of the District Court of the United States. The petition then stated the levies of the attachments in the consolidated suits in the chancery court of Memphis before mentioned, and claimed that the lien of Friedlander, Stich & Co. under the levy of their attachment was superior to the lien of the plaintiffs in the said consolidated suits. It stated further the decree in the consolidated suits, already mentioned, and the sales by the

Clerk and Master, and the vesting of the title to the property bought by I. M. Hill by the decree of the chancery court in him.

The petition alleged that Friedlander, Stich & Co. were not parties before the court when the said decrees were rendered, and that they were rendered in fraud of the bankrupt act. It claimed that Friedlander, Stich & Co., by virtue of their attachment, and the proceedings they had taken therein by the leave of the court in bankruptcy, had a lien on the lands attached in preference to creditors of Kaufman generally, and that as the estate of the bankrupt had not been finally disposed of, the court had jurisdiction to adjudicate the liens. It also claimed that the sale to Hill by the Clerk and Master was a nullity.

The petition made Kaufman's assignees in bankruptcy, and the various plaintiffs in the consolidated suits, defendants, prayed process according to the course of the court in bankruptcy, that the sales under the decrees of the chancery court be declared void, that the property be adjudged to form a part of Kaufman's estate in bankruptcy, and be put in the hands of the assignees, to be by them administered, that the lien of Friedlander, Stich & Co. be established and be decreed superior to the rights of the defendants, that the property be sold by the assignees, and the proceeds first applied to Friedlander, Stich & Co.'s debt, and the balance to the creditors of the said bankrupt, &c.

Record pp. 1–6.

The defendants, Geo. A. Davis & Co. and others, the attaching creditors of Kaufman in the consolidated suits in the chancery court, appeared in the District Court and filed a demurrer to the petition of Friedlander, Stich & Co., assigning causes of demurrer as follows:

(1.) The court had no jurisdiction of the subject matter or the parties.

(2.) The petitioners, as their petition showed, had proved their claim in bankruptcy against Kaufman's estate, and thereby had waived their lien under their attachment if they ever had any.

(3.) The petition came too late, if at any time petitioners ever were entitled to relief.

(4.) There was no equity on the face of the petition entitling them to the relief they sought, or any relief.

Record p. 6.

The demurrer was filed on the 10th October, 1870, and was overruled on the 12th October, 1870, and the defendants were allowed to answer.

Record p. 6.

On the 30th January, 1871, the defendant, I. M. Hill, filed his separate answer. In this answer he claimed that Friedlander, Stich & Co.'s attachment was void because of defects apparent on the face of it. He set up the nullity of the judgment of Friedlander, Stich & Co. against Kaufman in the law court because (1) there was no publication as required in suits by attachment. (2) No declaration was ever filed as required by law. And (3) Kaufman did not appear in the suit, or if he did, he did not appear till after he was adjudged a bankrupt, and then he had no right to appear so as to represent the property attached; and his assignees in bankruptcy were never made parties to the suit, and did not appear therein. The answer relied upon the appearance of Cirode and Coronna as assignees in bankruptcy, and the appearance of Friedlander, Stich & Co. by their petition, whereby they became parties to the consolidated suits in chancery, and that after they so became parties the property was sold by the Clerk and Master of the chancery court, and his sale was reported to the court, and was confirmed, and the title was by the decree of the court divested out of the parties to the suit and vested in Hill, who had caused his title to be registered. The decrees are then pleaded as a bar to the relief sought by the petition.

The answer concluded with a demurrer assigning as grounds:

(1.) The court had no jurisdiction to enforce the lien Friedlander, Stich & Co. claimed under the proceedings in their attachment suit in the law court of Memphis. (2.) Friedlander, Stich & Co. had proved their debt in bankruptcy against Kaufman's estate, and had thereby dismissed their suit by attachment in the law court, and extinguished any lien they might have had thereunder. (3.) If any one had a right to sue for the causes stated in the petition it was the assignees in bankruptcy of Kaufman, and not the petitioners. (4.) The petitioners showed no right in themselves to the land in controversy, and made no case entitling them to relief. And (5) the petition had no equity.

Record pp. 7–10.

The creditors in the consolidated suits in chancery filed an answer not differing essentially from the answer of Hill.

Record pp. 10–14.

Cirode and Coronna as assignees in bankruptcy of Kaufman filed their answer, evidently in the interest of Friedlander, Stich & Co., but it is not necessary to state its contents.

Record pp. 14–17.

The court on 1st June, 1871, struck out the demurrer in the answers of the creditors in the consolidated suits in the chancery court who had formerly demurred, and the demurrers of John M. Davies & Co. and Hill, who had not before demurred, were overruled.

Record p. 17.

At this point a reference was ordered to a register in bankruptcy to take proof and report the facts in issue.

Record pp. 17–18.

The register on the 6th January, 1872, made his report, and the parties entered into an agreement containing addi-

tional facts, and that agreement was made a part of the report of the register.

Record pp. 18–20.

In his report the register, among other things, states that no proof had been offered of a grant of leave by the court in bankruptcy to Friedlander, Stich & Co. to prosecute their suit at law in the Law court of Memphis to judgment against Kaufman, except the statement to that effect in the judgment of the law court, and that the fact was denied by the defendants.

Record p. 19.

It is true in the record appears a petition of Friedlander, Stich & Co. to prosecute their suit in the law court to final judgment, and that there appears endorsed on the petition the statement signed by the District Judge that the prayer of the petition is granted. It appears that this petition and the endorsement were filed in the cause on the 6th January, 1872. The District Judge's statement is without date, but the petition was sworn to by the attorney for Friedlander, Stich & Co., on the 8th April, 1869.

Record pp. 31–32.

It does not appear that the court in bankruptcy ever took any action on the petition.

It is very questionable if Kaufman's deposition, *the only proof relied on* by them, does not fail to prove the debt claimed by Friedlander, Stich & Co.

Record pp. 32–35.

The record from the Law court of Memphis is brought in.

Record pp. 35–39.

It has already been stated that Kaufman filed his petition in bankruptcy on the 30th May, 1868, and was adjudged a bankrupt on the 14th July, 1868, and on the 13th October, 1868, the register in bankruptcy conveyed to Cirode and

Coronna as the assignees of Kaufman, all his property and effects.

Record pp. 41, 14.

The transcript of the record of the law court, just referred to, contains an entry of a judgment of date 8th July, 1868. It recites the suing out of the attachment by Friedlander, Stich & Co., and its levy on the property, describing it, and that Kaufman had appeared and filed a plea in the cause, and that the papers had been lost, and the court had entered an order that they be supplied by the parties who filed them, and Friedlander, Stich & Co. had complied with the order, but Kaufman had failed to do so, and had failed to plead anew, and then proceeds: "It is ordered that judgment be rendered in favor of the plaintiffs and against the defendant for such default, and that a writ of inquiry issue returnable instanter." A jury then came to assess the plaintiffs' damages, who being sworn, returned a verdict that they found for the plaintiffs $19,311.81. The court then gave a judgment that the plaintiffs recover of the defendant the said sum, and that a *venditioni exponas* issue for said property to satisfy said judgment. But it appearing that Kaufman had been adjudged a bankrupt on his own petition by the United States District Court, and finally discharged from his debts and liabilities, and that the plaintiffs had obtained leave of the bankrupt court to proceed to judgment in the case, but execution to be stayed, it was ordered by the court that the issuance of the *venditioni exponas* be suspended until the consent of said bankrupt court, or until the further order of the court.

Record pp. 38–39.

On the 7th October, 1868, Friedlander, Stich & Co. had proved their debt against the estate of Kaufman in bankruptcy in the ordinary form, with this exception–they stated the suing out of their attachment in the Law court of Memphis against the real estate mentioned in Kaufman's schedule B 1, which suit they said was still pending, and that

they claimed the same as a prior lien on the said real estate, and that they protested against being treated as *pro rata* creditors.

Record pp. 45–46.

They proved another debt without security on the 17th October, 1868.

Record p. 44.

No replications were ever put in to the answers of the defendants.

The cause was heard in the District Court on the 18th December, 1872, and a decree was pronounced in favor of Friedlander, Stich & Co., and an appeal taken from such decree to the circuit court.

Record pp. 46–49.

The appeal was heard in the circuit court on the 7th February, 1873. It was then decreed that the decree of the District Court be reversed, and that the cause be remanded to it with the recommendation that Friedlander, Stich & Co. be permitted to amend their bill, to amend their proof of debt by estimating the value of their security by the attachment, and to amend all such other proceedings, and to take such additional proceedings as might be necessary, according to the course and practice of the District Court to enable the said Friedlander, Stich & Co. to secure their just rights as prior attaching creditors of the property of the said bankrupt under an attachment levied more than four months before the filing of the petition in bankruptcy of Kaufman.

This order, made by the court of its own motion, was preceded by a finding of supposed facts still more extraordinary, based partly on what the court understood from the representations of the counsel, and partly upon inferences drawn by the judge wholly outside the record, and was supplemented by suggestions as to what it was necessary,

in the opinion of the judge, Friedlander, Stich & Co. should allege in addition to what they had already alleged, in order to make out their case.

Record pp. 50–51.

The case then returned to the District Court, and on 23d February, 1874, leave was given by the court to Friedlander, Stich & Co. to amend their bill and proceedings as indicated in the order of the Circuit court, and to amend their proof of debt so as to estimate therein the value of the security attached, and to make such other amendments in said proceedings and proof of debt as they might deem necessary to enable them to secure their rights as prior attaching creditors of said property.

Record pp. 51–52.

The amendments were made on the 28th June, 1876, and were then spread at large on the minutes of the court.

Record p. 52–54

The court ordered that Friedlander, Stich & Co. be permitted to amend their proof of debt by describing the property attached, and estimating its value at $47,000, which the order says they then did, and all the defendants, except Cirode and Coronna, the assignees in bankruptcy, entered their exception to the orders allowing the amendments.

Record pp. 53–54.

It will be observed that by this amendment as to the proof of debt the value of the security claimed was made to exceed the debt proved by near $30,000, thereby, in effect, establishing the fact that there was in reality no debt to be proved in bankruptcy against the general assets of Kaufman, the bankrupt.

The former answer of Cirode and Coronna was by agreement made their answer to the amendment to the petition.

Record p. 54.

The other defendants filed an answer.

Record pp. 54–56.

In this answer they pleaded the statutes of limitation of three and six years of the State of Tennessee, and the act of Congress requiring suits by assignees to be brought within two years, in bar of the matters of the amendment.

Record p. 56.

No additional proof was taken or filed, and the cause was heard again in the District Court on the 29th June, 1876, and a decree was again pronounced in favor of Friedlander, Stich & Co., and an appeal taken therefrom to the Circuit court.

Record pp. 56–59.

The cause was heard on the appeal in the Circuit court on the 8th February, 1878, and the decree of the District Court was affirmed, and the cause was remanded to that court for the execution of the decree.

Thereupon the defendants, other than Cirode and Coronna, as assignees in bankruptcy of Kaufman, were granted an appeal to this court.

Record p. 61.

Lot No. 6, of Latham Fackler and Jones' sub-division of lot 3, block 55, on the plan of South Memphis, on Goslee street; and the lot at the southeast intersection of Elliott and Causey streets, fronting 125 feet on each street, and being about square, decreed to be sold in the consolidated suits in chancery, *were never attached* in the suit of Friedlander, Stich & Co., and as I understand the decree of the District Court, affirmed by the Circuit Court, have not been decreed to be sold in this suit.

If they have been decreed to be sold, on the ground just stated, whatever may be the result as to the other property, I ask that the decree as to them be reversed.

Record pp. 24, 36–37 and 56–59.

ASSIGNMENT OF ERRORS.

[1]

The court erred in overruling the demurrer of Geo. A. Davis & Co., and others to the bill or petition.

Record p. 6.

[2]

The court erred in striking out the demurrer to the bill or petition in the answer of Geo. A. Davis & Co. and others.

Record p. 17.

[3]

The court erred in overruling the demurrers of John M. Davies & Co. and Ira M. Hill to the bill or petition, contained in their respective answers to the petition.

Record p. 17.

[4]

The court erred in remanding the cause, after reversing the decree of the District Court of the 18th December, 1872, with the recommendation to permit Friedlander, Stich & Co. to amend their bill, and to amend their proof of debt, and to amend all other proceedings, and to take such additional proceedings as might be necessary to enable Friedlander, Stich & Co. to secure their rights.

Record pp. 51 and 61.

[5]

The District Court erred in allowing Friedlander, Stich & Co., against the objection of the defendants, to make the amendments to their bill or petition as shown by the order of 28th day of June, 1876, and the Circuit Court erred in affirming the said order of the District Court.

Record 52–54.

[6]

The District Court erred in making the decree of 29th June, 1876, and in refusing to dismiss the bill or petition of Friedlander, Stich & Co., and the Circuit Court erred in

affiming, and not reversing the said decree of the District Court.

Record pp. 56–59 and 61.

[7]

The court erred in not decreeing that the chancery court of Memphis had jurisdiction of all the parties, including the assignees in bankruptcy of Kaufman, and Friedlander, Stich & Co., in the consolidated suits in chancery, and of the property involved in this controversy, and that the District Court had no jurisdiction of the said property and no power to make an adjudication affecting the same.

[8]

The court erred in not upholding and giving effect to the title of I. M. Hill to the property purchased by him, and which title was vested in him by the decree of the Chancery court in the said consolidated suits, as appears in the record, and in overturning and disregarding such title of the said Hill, and decreeing a sale of the property.

Record pp. 29–31, 56–59, 61.

BRIEF.

I.

The District Court had not jurisdiction of Friedlander, Stich & Co.'s bill or petition. It is but a personal suit between them and the defendants to it, in which they, by their own showing, seek the benefit of a lien fixed by them, by a proceeding commenced in a State court before the bankrupt act was passed, and claim such lien is superior to another lien set up by the defendants under other proceedings commenced likewise in another State court before the passage of the bankrupt act. No question under the bankrupt act arises in the controversy between Friedlander, Stich & Co. and Hill, the purchaser, and the plaintiffs in the consolidated suits in the chancery court, who are made defendants to their bill or petition. The controversy between them is to be determined by reference to other laws. There is no controversy at all between Friedlander, Stich & Co. and Cirode and Coronna, Kaufman's assignees in bankruptcy. No relief is or could be asked against them, and manifestly they are formal parties merely.

Section 1 and the third clause of section 2 of the bankrupt act did not confer jurisdiction of suits between parties, neither of them being an assignee in bankruptcy, upon the District Courts. Its purpose was to confer jurisdiction to administer the estates of bankrupts, and in the course of such administration to collect in the bankrupt's assets by the necessary suits. The assignee in bankruptcy is the representative of the estate of a bankrupt, and plainly must be a substantial party, and is an indispensable party to any controversy brought before the District Court under the above sections.

This position I understand to be supported by the case of Stickney v. Wilt, 23 Wallace 150, and the cases it refers to.

Milner v. Meek, 95 U. S. 252, was a case appropriate for the exercise of the jurisdiction of the District Court, and the assignee was the party suing.

The cases of Glenny v. Langdon, 98 U. S. 20, and Trimble v. Woodhead, 102 U. S. 647, conclusively show that Friedlander, Stich & Co. could not bring this suit.

II.

My next position is that the District Court could not, upon the bill or petition of Friedlander, Stich & Co., withdraw the property in controversy from the jurisdiction of the Chancery court of Memphis, which had possession of it in the consolidated suits in chancery when the bankrupt act was passed by Congress, and when Friedlander, Stich & Co. filed their bill or petition, and that all its orders and decrees as to such property are *coram non judice*.

It was decided in Doe v. Childress, 21 Wallace 642, that in case of an attachment under State laws, made more than four months before the bankruptcy, and which is a valid lien, if the assignee does not intervene in the suit, but allows the property to be sold under attachment, the purchaser, in a case free from fraud, will hold against the assignee in a collateral attack upon his title.

And in Scott v. Kelly, 22 Wallace 57, the court held that where the assignee in bankruptcy voluntarily submits himself to the jurisdiction of a State court, and that court renders judgment against him, it is too late for him to allege that the Federal courts alone have jurisdiction in bankruptcy.

The same thing had been previously decided in Mays v. Fritton, 20 Wallace 414.

Kaufman's proceeding in bankruptcy did not displace the jurisdiction of the chancery court of Memphis to proceed in the consolidated suits in Chancery against Kaufman down to final decree and execution, and the title to be passed by a sale of the property attached in those suits under its decree was just as good after Kaufman's bankruptcy as it could have been had Kaufman never become bankrupt.

Peck v. Jenness, 7 Howard 320, which has been followed repeatedly, in effect so decides.

And see Riggs v. Johnson County, 6 Wallace, 166.
French v. Hay, 22 Wallace 250.

The case of Eyster v. Gaff, 91 U. S. 521, is more directly in point. The court there decided that the assignee in bankruptcy of a mortgagor appointed during the pendency of proceedings for the foreclosure and sale of the mortgaged property, stands as any other purchaser pending the suit, and he should have himself substituted for the bankrupt, or be made a defendant, if there is any reason for interposing, and that the pending bankruptcy of the mortgagor in the Federal court does not in such a case divest the jurisdiction of the State court in the suit of which it previously had full cognizance.

And see Claflin v. Houseman, 93 U. S. 130.
Jerome v. McCarter, 94 U. S. 734.
Stout v. Lye, 103 U. S. 66.

III.

Friedlander, Stich & Co., as well as Cirode and Coronna, the assignees in bankruptcy of Kaufman, it has been seen, made themselves parties to the consolidated suits in the Chancery court of Memphis, Cirode and Coronna before any decree, and Friedlander, Stich & Co. after the decree, but before the sale under the decree, and before the report of the sale and the decrees thereupon.

Mays v. Fritton, 20 Wallace 414, establishes the proposition that Cirode and Coronna are concluded by the decrees.

So far as Friedlander, Stich & Co. are concerned, they are equally concluded. They went into the Chancery court by their petition and made themselves parties to the consolidated suits there pending for the avowed purpose of having their lien under their attachment in the Law court declared superior to the liens of the plaintiffs in the consolidated suits in the Chancery court, to which they so became parties.

The case of Wiswall v. Sampson, 14 Howard 52, was somewhat similar. There a creditor having a judgment and lien on land, which was in possession of a receiver appointed by a court of chancery under a bill of another creditor of the same debtor, after making a levy under an execution issued on his judgment, applied to the Chancery court by petition and prayed that effect might be allowed to his title, and the court adjudged his title invalid, and the decision was held to be *res judicata*, and to bind his title in an action of ejectment.

The decrees confirming the report of the sales by the Clerk and Master, and divesting title out of all the parties to the suit, and vesting such title in Hill, were certainly determinations against the claim set up by Friedlander, Stich & Co. in their bill or petition.

If such determinations have not already been made by the Chancery court, the question is still there for decision, and the Federal court, as the authorities already cited conclusively show, could not withdraw the matter from its cognizance.

But the decree of the Chancery court in the consolidated suits need not expressly adjudicate the claim of Friedlander, Stich & Co. as set up in their bill or petition, in terms, or in fact at all, in order to sustain the defence of *res adjudicata*. It is enough that the question was presented in the record and might properly have been decided, and that a judgment or decree has been pronounced.

Cromwell v. Sac County, 94 U. S. 351, 352.

In Stout v. Lye, 103 U. S. 66, a suit was pending in a State court to foreclose a mortgage. A creditor of the mortgagor having a judgment which was a lien on his equity of redemption, filed a bill in a Federal court in equity against the mortgagor and the mortgagee to set aside the mortgage as illegal. The State court then rendered a decree foreclosing the mortgage and directing a sale. The mortgagee pleaded the decree as a bar to the suit in the Federal court, and this court held it was a bar.

IV.

The record discloses the fact that Friedlander, Stich & Co. have no such valid subsisting lien on the property attached as the court below could enforce by decreeing the sale of the property.

[1]

The lien fixed by the levy of their attachment from the Law court, supposing the attachment to have been valid in all respects, depended entirely upon the proceeding by attachment being pursued to judgment and to a sale of the property attached by a *venditioni exponas* issued in pursuance of the judgment.

Seawell v. Williams, 2 Tennessee 272 (Cooper's Edn.)
Snell v. Allen, 1 Swan 207.
Green v. Shaver, 3 Humphreys 138.
Perkins v. Norvell, 6 Humphreys 151.
Boggess v. Gamble, 3 Coldwell 148.

The cases all show that there can be no substitute for the precise mode prescribed, and that any departure, as for instance the issuance of an ordinary writ of *fieri facias* on the judgment, is a waiver or abandonment of the lien.

For this reason alone it was not competent for the court in bankruptcy to decree the sale of the property attached in order to give effect to the lien of the attachment of Friedlander, Stich & Co.

[2]

A creditor having an attachment on the property of the bankrupt, such as Friedlander, Stich & Co. had upon the property of Kaufman, does not, I submit, hold a security for his debt within the meaning of section 22 of the bankrupt act, Revised Statutes, sec. 5077.

This seems to me to follow from the fact that the attachment lien, as we have seen, can be made effectual only by prosecuting the suit in which the attachment is sued out to final judgment, and by having the property sold under a *venditioni exponas* issued on the judgment.

After proof of the debt in bankruptcy such a course could not be pursued, because the bankrupt act, sec. 21, Revised Statutes U. S., sec. 5105, provides: "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him, and all proceedings already commenced, or unsatisfied jundgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby."

No exception is made in the statute, and the settled rule is the courts can make none, and it follows that after proving their debt in bankruptcy against Kaufman, Friedlander, Stich & Co. could proceed no further in their attachment suit in the Law court, and hence, could not make the lien they had fixed by the levy of their attachment effectual.

The case of Peck v. Jenness, 7 Howard 612, and the many cases in the same line, proceed, I submit, upon a theory which supposes the correctness of the above proposition.

The proceeding by attachment, those cases allow to proceed to judgment and sale for the very purpose of giving effect to the lien of the attachment, and because, as I submit, such lien can be enforced in no other way.

[3]

The judgment of the Law court relied upon by Friedlander, Stich & Co., is not, I submit, a valid judgment for any purpose.

It is not claimed that any process was ever served upon, or that any publication as required in suits by attachment was ever made as to Kaufman, the defendant.

There is no recital in the record of the Law court anywhere to show that Kaufman ever appeared in the suit, if we except the historical statement in the final judgment that he had formerly filed a plea in abatement which had been lost.

Record p. 39.

The court could not make evidence to support its jurisdiction in any such way.

Thompson v. Whitman, 18 Wallace 457.
1 Taylors Evidence, sec. 1568, etc.

Bullock's affidavit, if admissible for the purpose, shows only that Kaufman filed a plea in abatement of the attachment. But it was wholly inadmissible.

Record p. 37.
Pierce v. Bank of Tennessee, 1 Swan 265.
Lane v. Jones, 2 Coldwell 322–323.

The mere filing of such a plea, it is settled in Tennessee, is not an appearance to the merits of the action, and will not authorize a personal judgment.

Boon v. Rahl, 1 Heiskell 12.
Sherry v. Divine, 11 Heiskell 722.
Willey v. Rairden, 2 Baxter 227.

Upon this state of the record the Law court had no such jurisdiction of the person of Kaufman as authorized it to pronounce a judgment by default against him for the debt

Friedlander, Stich & Co. claimed of him, and the judgment it assumed to pronounce is void.

In addition to above authorities, see Pennoyer v. Neff, 95 U. S. 714.

It is questionable whether if he had been before the court, it had jurisdiction to order him to supply the lost papers in the cause, and because of his failure to supply them, to pronounce a judgment against him in the suit.

Code of Tennessee, sec. 3907.
Freeman on Judgments, sec. 89.
Lane v. Jones, 2 Coldwell 318.

And further, the mode pursued to prove the loss of the record in the first place, and to supply it in the second place, was not according to the established practice, and probably was beyond the power of the court.

Record p. 37–39.
Code of Tennessee, sec. 3907.
Lane v. Jones, 2 Coldwell 318.
Pierce v. Bank of Tennessee, 1 Swan 265.

Indeed there is no order of the court substituting the supplied record for the original, and upon the face of the judgment, it appears that only a part of the record was attempted to be supplied.

Record pp. 38–39.
Pierce v. Bank of Tennessee, 1 Swan 265.
Freeman on Judgments, sec. 89.

Another fact appears in the pretended judgment which ought, it seems to me, very seriously to impair its validity. Kaufman, besides not having been served with any process, and not being represented in court when the judgment was rendered, or at any time, so far as the record shows, as I insist, had then been discharged in bankruptcy, and hence could have had no possible interest in defending the suit, and Cirode and Coronna, his assignees in bankruptcy, the only parties having any interest adverse to Friedlander,

Stich & Co., were not before the court, and had no notice to be there so far as the record discloses.

In reply to the position that the court in bankruptcy had given Friedlander, Stich & Co. leave to prosecute the suit in the Law court to judgment against Kaufman, I say the fact is not that way. The judge of the District court was not the court, except when sitting as such, and then an authorized record of his proceedings as a court was preserved. To such record alone we must appeal for the action of the court. The order appearing in the petition for leave to go on with the suit in the Law court was but the personal act of the District judge, and was not of the least force as an order of the court. And the Register reported as a fact in the case, and his report was not excepted to, that there had been no evidence of such leave adduced before him.

Record pp. 31–32, 19 and 39.

V.

It is not seen how the amendments recommended by the Circuit court, and made in the District court, have strengthened the case of Friedlander, Stich & Co.

Record pp. 51 and 52–54.

But if they have, I submit such amendments, made at that time, and under such circumstances, could not affect the rights of the defendants. Those rights had been the subject of litigation for some years upon a state of facts entirely satisfactory to Friedlander, Stich & Co. and their counsel, and it was not in the power of the Circuit judge on appeal to order a change of the state of facts constituting the basis of the suit, and after having the state of facts changed to give to Friedlander, Stich & Co. the benefit of such new facts in this litigation. He was not asked to remand the cause to the District court for amendment, much less to remand that a new case might be made. He did all that was done of his own motion. I submit his duty was

to decide the case before him, and that the defendants cannot be prejudiced by what he has caused to be done.

Snead v. McCoul, 12 Howard 407, 421–422.
2 Abbott's U. S. Practice, pp. 108–109, 219–220.

One remarkable feature of the amendment of the proof in bankruptcy is that Friedlander, Stich & Co., by the amendment, fixed the value of their security at largely more than the amount of their debt.

Record pp. 45, 54.

They could have been creditors of the estate of Kaufman only for the surplus of their debt above the value of their security.

McHenry v. La Societe, &c., 95 U. S. 58.

And, as upon the amendment they had no debt, I suppose they ceased to have a *status* in the court of bankruptcy.

Again, had Cirode and Coronna, as assignees in bankruptcy of Kaufman, undertaken on the 28th June, 1876, to bring a suit against the defendants, such suit would have been barred by the statute of limitation of Congress.

And, as Friedlander, Stich & Co., if they have any position in court at all, must stand in the place of Kaufman's assignees in bankruptcy for the purposes of this suit, the same statute must bar them.

Gifford v. Helms, 98 U. S. 248.

If any substantial new ground of action was introduced into the suit by the amendment of the 28th June, 1876, the statute of limitations would run against such new cause of action up to the date of the amendment.

Crofford v. Cothran, 2 Sneed 492.
Schrnertzell v. Purcell, 1 Cranch C. C. 246
Sicard v. Davis, 6 Peters 124.
Miller v. McIntyre, 6 Peters 61.

WM. M. RANDOLPH,
Of Counsel for Appellants.

Memphis, November 24, 1881.

Supreme Court of the United States

OCTOBER TERM, 1881.

No. 170.

GEORGE A. DAVIS & CO. ET AL.

vs.

FRIEDLANDER, STICH & CO. ET AL.

BRIEF FOR APPELLEES.

ABRAHAM & MAYER, Attorneys.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term, 1881.

GEORGE A. DAVIS & CO. ET AL.

vs.

FRIEDLANDER, STICH & CO. ET AL.

No. 170.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

On the 30th day of November, 1866, Friedlander, Stich & Co., appellees, a partnership firm domiciled and doing business in the State of New York, being creditors of L. Kaufman, duly sued out an attachment against him in Shelby county, Tennessee, under the laws of that State, and on the same day the attachment was levied on certain real property in that county, and duly returned into the law side of the Law and Chancery Court of Memphis, in said county, on December 1, 1866. The appellants being also creditors of L. Kaufman, subsequently filed their attachment bills in the Chancery Court of Memphis, or intervened and became parties to a bill already filed by a creditor in said court, and levied their attachments as follows:

December 1, 1866, bill of George A. Davis & Co. filed, and attachment levied.

December 3, 1866, bill of Levi Dittlebuck & Loucheim and Antler & Schaffer filed, and attachment levied December 4, 1866.

December 5, 1866, bill of Carter, Kirtland & Co. filed, and writ levied.

December 27, 1866, bill of J. Stellheimer & Co. filed, and writ levied on the next day.

January 9, 1867, the Jackson Insurance Company intervened.

January 22, 1868, John M. Davies & Co. made themselves parties to the bill of J. Stellheimer & Co., and levied their writ.

The property levied upon under the several attachment writs of the appellants included all of the property that had been levied upon by the appellees.

On May 30, 1866, Kaufman filed a voluntary petition to be declared a bankrupt in the District Court of the United States for the western district of Tennessee. He was adjudicated a bankrupt on July 14, 1868, and received his discharge on March 24, 1869.

The assignees (Cirode and Coronna) of the bankrupt were appointed, and the bankrupt's estate assigned to them on October 13, 1868.

On October 7, 1868, the appellees proved their debt in the Bankrupt Court, reciting therein and claiming the security arising from the lien of their attachment. (R., p. 45.)

April 8, 1869, appellees applied to the Bankrupt Court for leave to prosecute their attachment suit to judgment, on the ground that there was a dispute as to the amount due, and leave was granted on the same day. (R., pp. 31, 32.)

The suits of appellants were consolidated in the Chancery Court of Memphis, and without obtaining leave of the Bankrupt Court, they prosecuted the consolidated suit to judgment before the discharge of the bankrupt.

None of the appellants proved their debts in the Bankrupt Court. (Register's Report, R., p. 18.)

On December 16, 1868, the Chancery Court of Memphis, in the consolidated attachment suit of appellees, rendered a decree, (R., p. 23,) which, after declaring the validity of conveyances by L. Kaufman, which are not in issue here, found the indebtedness of Kaufman to the appellants to be as follows: Antler & Schafer, $719.60; Levi Dittlebuck & Loucheim, $7,463.03; Carter, Kirtland & Co., $9,207.43; Geo. A. Davis & Co., $6,337.87; J. Stellheimer & Co., $4,953.43; Jackson Insurance Co., $4,890.59; Jno. M. Davies & Co., $1,782.50; and rendered judgment against Kaufman in accordance, and ordered execution to issue therefor.

It then found and adjudged the several liens of the parties complainant upon the real property attached, and decreed the sale of the property by the clerk and master and the distribution thereof among the complainants, in accordance with the several priorities of their attachment liens.

An assignment by Kaufman to Coronna, one of his assignees, of date December 7, 1868, of certain personal property described in the decree, is declared to be void as against creditors. The surplus from the sale, if any, after satisfying the liens in full, costs, &c., is directed to be paid to the assignees of Kaufman. It is further expressly decreed "that the plaintiffs shall have the benefit of their judgments against Kaufman" for any balance of their debt which might be unsatisfied after distribution of the proceeds of the sale of the attached property. Provides further that the assignment of personal property from Kaufman to Coronna may stand on the payment of the consideration mentioned therein to the creditors. The decree closes with these words: "The foregoing decree is not intended to

affect the right of any person or persons not before the court, but the rights of all such persons are saved to them respectively."

The assignees of Kaufman, for the purposes and in the manner to be hereafter shown, became parties defendant to this chancery suit a short time before the decree rendered.

Before the sale of the attached property, and after the decree, appellees filed their petition in the Chancery Court of Memphis setting forth their prior lien, the bankruptcy of Kaufman, the scheduling of the attached property by the bankrupt as a part of his estate subject to the attachment, the appointment of the assignees, and that they did, and appellants did not, prove their claims in the Bankrupt Court. They further showed that they were not made parties defendant or complainant to the chancery suit, although complainants had full knowledge of their attachment; that the property is to be sold without reciting their lien, and as if the title were clear; and that if the lien is known of by purchasers at the sale, it will injuriously affect the salable value of the property, or will enable purchasers, not knowing of their lien, to have the sale set aside because thereof.

They ask that the sale be stayed and they be made parties to the bill, and allowed a reasonable time to file their petition to become parties to the suit and to establish their claim. (R., pp. 39, 40, and 41.)

The chancellor declined to postpone the sale, but granted leave to the petitioners to become parties to the consolidated suit, and establish their claim to the fund arising from the sale.

No action was thereafter taken on their petition, and appellees did not become parties in any way to the proceeding. (Agreed statement, R., p. 20.)

The property was sold under this decree, and a large quantity of it purchased by I. M. Hill, as the agent of and for certain of the appellants, for the sum of $2,500, and the

purchase-money was paid by receipts for the same given by certain of the creditors, the amounts to be charged to their respective judgments, (Master's report of sale, R., p. 42; Hill's answer, R., p. 20,) and at the sale all parties were duly notified of the prior subsisting lien of appellees. (R., p. 31.)

That part of the attached property not bought by Hill at the sale was bought by one of the attaching creditors complainants in the Chancery Court (Carter, Kirtland & Co.); but the terms of the sale were not complied with by them, and the sale to them was not confirmed.

On March 27, 1869, the Chancery Court of Memphis confirmed the sale to Hill. (R., p. 29.)

On July 8, 1869, judgment was rendered in the Law Court of Memphis for plaintiffs against Kaufman, the judgment entry reciting Kaufman's bankruptcy and the leave given by the Bankrupt Court to proceed to judgment and staying execution.

On August 20, 1870, appellees filed their petition in the Bankrupt Court, setting forth their attachment proceeding and the subsequent attachments and the proceedings in the Chancery Court thereon, and asked that all the attaching creditors, plaintiffs in the Chancery Court, and the assignees of Kaufman be made parties defendant, and prayed that the sale of the attached property be declared void; that it be adjudged to form part of the bankrupt's estate, and be placed under the control of the assignees as a part of the bankrupt's estate, and for the sale thereof and satisfaction of their prior lien.

They also executed to the assignee a bond for payment of the costs of the suit. The answer of I. M. Hill, filed January 30, 1871, denies the existence of the debt from Kaufman to appellees, and for which their attachment was levied, avers that the suing out of their attachment was produced by collusion with the bankrupt and intended to give them a fraudulent preference over the other creditors,

and that they prosecuted their attachment suit by collusion with Kaufman, and that they had no real interest, but were acting solely for the benefit of Kaufman; that the attachment proceedings by appellees are void, for defects apparent on their face; that the recitals in the entry of their "pretended" judgment and of the supplying of lost papers in the attachment proceedings is false, but if true the action of the court was without authority and void; that the judgment is void because there was no publication in the attachment proceedings; that there was no declaration filed by the plaintiffs therein; that Kaufman never appeared in the proceedings, or if he did appear, it was after he had been adjudged a bankrupt, and "to fraudulently facilitate the petitioners," &c.; that when the judgment was rendered, (July 8, 1869,) Kaufman had been discharged in bankruptcy; that at the time leave was given to prosecute the suit, Kaufman had been discharged in bankruptcy and the assignees had not become parties; that Cirode and Coronna (assignees of Kaufman) were on November 20, 1868, notified by their co-defendants of the pending suit in the Chancery Court, and that they might, if they chose, make themselves parties to it; that in pursuance of the notice they appeared and were admitted as parties thereto. The answer also sets up the application of the petitioners for the stay of the sale and to be admitted as parties in the Chancery Court to establish their claim; the sale of the property under the decree of the Chancery Court of Memphis, the purchase of a part thereof by the defendant, and the confirmation of the sale by decree of the Chancery Court, and vestiture of title thereby in the defendant, and sets up the same as a complete bar to the relief claimed by petitioners against him or the property purchased by him. The answer repeats the demurrers to the petition overruled before the answer was filed: (1) that the court has no jurisdiction to aid the petitioners in the enforcement of their lien; (2) that their

proof of debt in bankruptcy operated to extinguish their lien and dismiss their suit in the Law Court of Memphis; (3) that the assignees and not the petitioners are the proper parties to sue; (4) that petitioners "show no right in themselves" to the land mentioned in the petition; (5) that the petition has no equity.

The answer of the other defendants, (other than the assignees,) excepting that they set up no claim as purchasers to the property sold at the sale, is substantially the same as that of Hill.

The assignees, Cirode and Coronna, join in a separate answer alleging that the schedule of the bankrupt exhibited the names of the several attaching creditors, with the amount due to each, and that the amounts aggregated about $43,500; that Cirode had the chief management of the bankrupt's estate, and had an attorney and solicitor to advise him, he being assignee in a large number of cases; that all the attachment suits were commenced more than four months before the filing of the petition in bankruptcy, and were, therefore, not dissolved by the operation of the bankrupt act, and that the value of the property attached was probably much less than the amount of claims represented by the attachment suits, and that the only probable interest in the suits for the assignees would be the remote possibility of a surplus of the proceeds arising from the sale of the attached property, which surplus could be secured by them at any time if there should be any. For these reasons no action was taken by the assignees to become parties to the suits, until about November 20, 1868, when they were served with a notice of the pendency of the said several suits in the Chancery Court of Memphis, and the fact that they were on trial, which notice was signed by the counsel for the attaching creditors. Upon service of this notice their counsel and solicitor went into the court-room, where he found the causes on trial. Not having had an opportunity to examine closely the papers

and pleadings in the case, he relied upon the statements of the counsel of the several creditors, which were, in effect, that the only interest which the assignees could possibly have therein was to claim such surplus as might remain after settling the attachment claims; wherein he assented to an order showing the presence of the assignees by him as their counsel. The order was entered while the causes were on trial, and was agreed to by the respondent's counsel, because they could not stop the proceedings if such had been the proper course, and in order to save such rights as the assignees might have in the premises.

They ask that if F. S. & Co. be held by the Bankrupt Court to have a prior lien, that the property be turned over to them, the assignees, for distribution as the assets of the bankrupt under the order of the court. They then pray for all necessary orders and relief from the court for their advisement and protection.

There was an order of reference by the Bankrupt Court to the register in bankruptcy, and the latter reported (R., p. 18) the order of time when the several attachments were levied; that the judgment rendered for the appellees in the Law Court of Memphis for $19,311.81 was proven to be for a just debt contracted; that the defendants offered no evidence to the contrary, and that therefore the judgment stands uncontested; that the defendants do not claim to have had leave from the Bankrupt Court to prosecute their suits to judgment, while petitioners do so claim, and the judgment entry in the Law Court so recites; that the judgment was rendered July 8, 1869, and the bankrupt was discharged March 24, 1869. There was no exception to the register's report.

There was an agreement as to the register's report made by all the parties. This agreement recites that the record does not show that any action whatever was ever taken by the Chancery Court upon the petition of appellees; that the bidders and purchasers at the sale under the chancery

decree were publicly notified at the time and place of sale of the prior lien of appellees. It is also agreed that the notice to the assignees to appear in the Chancery Court and become parties, the record entry of their appearance and becoming parties, the decree of the chancellor, the report of the sale under the decree, the confirmation of the sale, the petition of the appellees to the chancellor for the postponement of the sale, the order of the chancellor thereto, the application for and grant by the Bankrupt Court of leave to the appellees to prosecute their suit in the Law Court of Memphis, are specifically made part of the register's report with the same force and effect as if formally reported by the register.

All portions of the record of any of the causes are also to be used on the hearing as either party may desire, and to be a part of the record in case of appeal or writ of error.

December 18, 1872, the District Court rendered a decree setting aside the sale under the chancellor's decree, adjudging priority to appellees, and directing that the assignees take possession of and sell the property and distribute the proceeds in accordance with the priorities of the respective creditors.

The defendants, excepting the assignees, appealed to the Circuit Court; the Circuit Court found that complainants, upon the facts shown, were justly entitled to a lien; that the property was in the custody of the District Court at the time of the sale in the State Court of Chancery, and that the lien should be paid by the assignee after the sale of the property; that the unauthorized and mistaken appearance of the assignees in the State court, and the decree rendered therein, did not divest the lien of complainants, nor displace their priority, but that the bill was insufficient in not showing the reasons why the assignees were made defendants and not complainants, why they appeared in the State court, why they did not therein defend and set up their

rights as representatives of the creditors of the bankrupt, and that it should also show that the purchasers at the sale were not strangers to the attachment proceedings, but bought as the agents of the complainants of the attachment. The decree was therefore reversed, and the cause remitted to the District Court, with the recommendation that the complainants be permitted to amend their bill, and to amend their proof of debt by stating the value of the security by attachment. Appellees were allowed and did amend their bill accordingly.

The respondents, answering the amended bill, admit that Hill purchased as their agent, and holds the property in trust for them; deny that they made any representations to the assignees or their solicitors to induce them to become parties, and deny any agreement or understanding with them.

The District Court rendered a decree in accordance with its former decree. Appellants, except the assignees, appealed to the Circuit Court, which affirmed the decree of the District Court, from which decree they appealed to this court.

ARGUMENT.

Did the assignees in bankruptcy, by becoming parties to the decree in the Chancery Court of Memphis, submit the lien of appellees to the jurisdiction of that court?

There is a controversy between the assignees and appellants, defendants in the lower court, as to whether the assignees were induced to become parties defendant in the chancery suit, by the representations and agreement of the complainants in the chancery suit, that the assignees had no other interest in becoming parties than to receive the surplus arising from the sale of the bankrupt's property,

should any there be, after the liens of complainants should have been satisfied from the proceeds of the sale and the costs paid. The complainants (appellants in this court) deny such representations and agreements, while the assignees insist upon them and plead them in their answer, as an excuse or apology for permitting themselves to become parties to the proceeding. Certainly the conduct of the assignees proves their statement that they believed themselves to be parties, for the sole purpose of receiving the surplus, and that their attorney, through whom they were made parties, so believed. But it is plain from the record that they were only nominal parties. They were defendants, but set up no defense. They did not plead the bankruptcy of Kaufman, nor the prior lien of appellees. They interposed no claim to the assets of the bankrupt, nor any plea or defense whatever. But while appellants duly served notice upon the assignees to appear and become parties, they served none upon appellees. The latter aver in their petition that they had no knowledge of the proceedings until after decree rendered (when they vainly attempted to stay the sale), and this is not denied. Under these circumstances it is of no consequence to appellees that the assignees were parties to the chancery suit. The assignees could not submit to the jurisdiction of the Chancery Court a greater interest in the bankrupt's estate than was vested in them. Section 14 of the bankrupt act (U. S. Statutes, vol. 14, p. 523) provides that the assignee "may prosecute and defend all suits pending at the time of the adjudication of bankruptcy in which such bankrupt is a party, in his own name, in the same manner and with like effect as they might have been presented or defended by such bankrupt." Does the assignee, by becoming a party defendant, submit the property within his custody as assignee to the control and jurisdiction of the State court without regard to the liens and claims upon the property possessed by strangers to the suit

and recognized and protected by the bankrupt law? If Kaufman (the bankrupt) had not filed his application in bankruptcy, and if judgment had been rendered against him in favor of appellants in the State court, would this judgment have taken from the appellees their prior lien upon the property, which they were prosecuting to judgment in another court of competent jurisdiction? Could the defendant, if he were not a bankrupt, by becoming a party to any legal proceeding, or by any act of his to which the lien creditor was a stranger, subordinate the superior lien of one creditor to the junior lien of another? What the bankrupt could not do before he became bankrupt, the assignee could not do. He holds the property subject to the lien of appellees, just as the bankrupt held it before his petition in bankruptcy was filed.

The established rule is, that except in cases of attachment against the property of the bankrupt, within a prescribed time preceding the commencement of the proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title, subject to all equities, liens, and incumbrances, whether created by operation of law or the act of the bankrupt, which existed against the property in the hands of the bankrupt.

Yeatman *v.* The Savings Institution, 95 U. S., 765.
Jerome *v.* McCarter, 94 U. S., 734.
Donaldson, assignee, *v.* Farwell, 93 U. S., 631.
Brown *v.* Heathcote, 1 Atk., 631.
Mitchell *v.* Winslow, 2 Story, 630.
Gibson *v.* Walder, 14 Wall., 244.
Cooke *v.* Tullis, 18 Wall., 332.
Minor *v.* McClellan, 2 Story, 492.
Goddard *v.* Weaver, 1 Wood, 260.

The appellees were in no way parties to the decree in the Chancery Court; their lien was not by their act, and

could not be by the act of the assignees, submitted to the jurisdiction of the Chancery Court, and therefore they could not be deprived of their priority by any judgment or process of said court. They were not parties to the decree in the Chancery Court, and the decree expressly declares that "the foregoing decree is not intended to affect the rights of any person or persons not before the court, but the rights of all such persons are saved to them respectively." This language was doubtless used by the Chancellor because the attachment proceedings of appellees in the Law Court had been brought to his notice during the trial in the Chancery Court. (R., p. 28.)

Appellees, by proving their claim in the Bankrupt Court, did not waive the priority of their attachment lien. In their proof of debt, they set up and claimed their security.

The proof of debt admitted them as creditors of the general estate, for the balance of their debt, after deducting the value of the incumbered property.

McHenry *v.* La Société Francaise, 95 U. S., 58.
Claflin *v.* Houseman, 93 U. S., 130.
Mays *v.* Fritton, 20 Wall., 414.
Eyster *v.* Gaff, 91 U. S., 525.

A creditor should always prove his claims. Any other theory is entirely irreconcilable with the provisions of the bankrupt act. If the enforcement of his lien satisfies his demand, his debt will be discharged. But if it does not, then the balance remains as a general claim against the estate, like all other unredeemed claims.

Bump, 633, and cases cited.

The judgment for appellees in their attachment proceedings in the Law Court of Memphis was valid, and was not fraudulent.

Appellants attack this judgment on the following grounds:

(1) There was no publication in the attachment proceedings.

(2) The appellees filed no declaration, or if they did, its filing was unauthorized by law.

(3) The defendant (Kaufman) never appeared in the proceedings.

(4) If he did appear it was after he had been adjudged a bankrupt.

(5) His appearance, if he did appear, was for the purpose of "fraudulently facilitating the petitioner in the recovery of the judgment, and to hinder, delay, and defraud his creditors."

(6) Because, at the time the judgment was rendered in the Law Court, there was no defendant in the proceedings before the court, the bankrupt having, before that time, been discharged by the Bankrupt Court, and the assignees were not made parties.

The answer to the first objection is, that no publication was necessary, because, as appears affirmatively by the record of the proceedings in the Law Court of Memphis, the defendant appeared in the cause and pleaded to the declaration. (R., p. 37.)

The only purpose of publication is to serve sufficient notice on the defendant, in order that he may become a party to the suit, or, failing to appear after legal notice, may be bound by the judgment of the court therein.

Code of Tennessee, sec. 3518: "The officer granting the attachment may, at the time, direct that as soon as the attachment is levied, publication may be made in some newspaper, requiring the defendant to appear, at a time and place to be mentioned in such publication, before the court or justice having cognizance of the attachment thus commenced; otherwise the cause may be proceeded with *ex parte*.

Sec. 3519. "If the order of publication is not then made, the clerk of the court, the court itself, or the clerk before

whom the attachment is required may make such order at any time thereafter."

See, also, Drake on Attachment, sec. 436.

The record imports absolute verity, not only as against parties to it and persons in privity with them, but against strangers also, and no one may produce evidence to impeach it.

Bigelow on Estoppel, pp. 3 and 4.

2. It also appears affirmatively by the record that appellees did file a declaration in the Law Court of Memphis; that the declaration was lost from the files in the office of the clerk of the court, together with a plea in abatement which had been filed by the defendant Kaufman, and that appellees obtained leave of the court to supply the lost papers, and those of appellants were supplied in accordance with sec. 2876, Code of Tennessee:

"If an original process, pleading, or paper in a cause be lost or withheld by any person, the court may, at any stage of the suit, authorize its place to be supplied by a copy, to be used instead of the original, as prescribed in part 3, title 3, chap. 8."

Section 3907, Code of Tennessee, reads:

"Any record, proceeding, or paper filed, in an action either at law or in equity, if lost or mislaid unintentionally, or fraudulently made away with, may be supplied, upon application, under the orders of the court, by the best evidence the nature of the case will admit of."

The defendant failed to supply his lost paper or to plead anew, and judgment was rendered against him by default.

Affidavit of Bullock, R., p. 37.

Judgment entry, R., pp. 38, 39.

"Something more than the passive non-resistance of an insolvent debtor to regular judicial proceedings in which a judgment and a levy on his property are obtained, when

the debt is due and he is without just defense to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt law."

Wilson *v.* City Bank, 17 Wall., 473.

3 and 4. The defendant (Kaufman) "shortly after" the 24th day of May, 1867, and "at the same term of the court," filed his plea in abatement. (R., p. 37.) He was not adjudicated a bankrupt until the 24th day of March, 1869.

5. It is impossible to learn from the record of any state of facts to base the allegation that the defendant's (Kaufman's) appearance in the Law Court as a party "was for the purpose of fraudulently facilitating the appellees in the recovery of their judgment, and in order to hinder, delay, and defraud his creditors." All the proceedings by which appellees secured their levy of attachment and obtained judgment thereon are closed against the charge of fraud. Although appellants charged fraud in their answer to the petition of appellees, yet when the question of fraud *vel non* was referred by the Bankrupt Court to the Register for determination, the appellants offered no evidence in support of the allegation, while the appellees showed affirmatively, by the testimony of Kaufman, that the debt was actual and *bona fide*. The Register states in his report that "the deposition of L. Kaufman, taken by the petitioners (appellees), states that he was indebted to petitioners in the sum of $18,000 in good faith, and that he has never paid the same. As to these proceedings, therefore, the judgment of $19,311.81 stands uncontested, though the answer charges the same to be entirely fraudulent." Appellants took no exception to the Register's report, and made no objection to its confirmation.

But it will not be denied that the Law Court of Memphis had jurisdiction of the subject-matter; and it is shown by

the record that appearance was duly entered; thus the court had jurisdiction of both the subject-matter and the parties. The judgment is therefore conclusive, and not open to impeachment collaterally.

Lamp Chimney Co. *v.* Brass & Copper Co., 91 U. S., 661, and cases cited.

6. The proceedings in the Law Court, by appellees on their attachment, had been commenced long before the filing of Kaufman's petition in bankruptcy or his adjudication as a bankrupt, and Kaufman, as before shown, had become a party thereto long before his petition in bankruptcy was filed. He continued a party to the proceeding, and did not plead his discharge in bankruptcy in bar of the suit. He therefore continued as a party defendant to the action, and judgment was not obtained until after his discharge in bankruptcy.

The proceeding to judgment by appellees was not, therefore, objectionable to that part of section 14 of the act, embodied in section 5106 of the Revised Statutes, which extends the prohibition in the case of provable debts only to the discharge of the bankrupt.

It is true the assignees were not parties to the attachment suit in the Law Court. But it is also true that they interposed no objection to the motion made by appellees for leave to prosecute their suit in the Law Court to judgment. Neither in their answer to the petition filed by the appellees in this case do appellants interpose an objection to their claim. But they do state in their answer that they had knowledge of the attachment proceedings by appellees, and they further aver that the aggregate amount of the incumbrances upon the property was so great that the general creditors, unsecured by liens, had no interest therein, and therefore they gave no attention to the proceedings either in the Law or Chancery Court.

In the case of McHenry *v.* La Société Francaise, 95 U. S.,

p. 58, this court says: "His [the assignee's] duties relate chiefly to unsecured creditors, and he need not trouble himself about incumbered property, unless something may be realized out of it on their account, or unless it becomes necessary to do so, to ascertain the rights of secured creditors on the general estate." The fact that the assignees, with full knowledge of the proceedings, did not make themselves parties thereto cannot affect the validity of the judgment.

Indeed, from the record it is apparent that the assignees had no defense to interpose in the Law Court, or objection of any kind in the Bankrupt Court, to the claims of appellees. One of the assignees (Coronna) himself, as agent of the appellees, sued out their attachment in the first instance, as he shows in his answer, and the justice and good faith of the debt from the bankrupt to appellees are shown by the record to be indisputable.

Nor was the proceeding to judgment such a maintenance of suit as is prohibited by that part of section 21 of the act which provides that "no creditor proving his debt or claim shall be allowed to maintain any suit at law or equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him." This part of the act must be construed *in pari materia* with the other part of section 21, which expressly provides that when the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may be proceeded to judgment, and that the amount ascertained by the judgment may be proved in bankruptcy, with that of section 14, which recognizes and secures the liens upon the bankrupt estate, and the jurisdiction of the courts to ascertain and liquidate all liens and other specific claims on the bankrupt's estate.

At the time judgment was rendered in favor of appellees in the Law Court, the estate of the bankrupt still remained unsettled in the hands of the assignees, and appellees (by leave of the Bankrupt Court) proceeded to judgment,

merely for the purpose of ascertaining the amount of their claim against the bankrupt estate. The judgment entry in the Law Court recites that the bankrupt had been discharged from all his debts and liabilities; that the plaintiffs (appellees) had obtained leave of the Bankrupt Court to proceed to judgment in the case, and execution is stayed "until consent of the United States District Court." (R. 39.) There is no limit as to the stage of proceedings in the Bankrupt Court within which the court may grant leave, in its discretion, to have settled the amount of a disputed claim on the bankrupt's estate, in order to aid it in ascertaining the charges thereon. It would be absurd to contend that though the claim of the creditor may be proved in bankruptcy after it shall have been fixed by judgment in the State court, yet if it be proved *before* the judgment, and a dispute as to the amount thereof is, in the discretion of the Bankrupt Court, to be ascertained by judgment, the creditor is prohibited from proceeding to judgment by the prohibition to the maintenance of any suit against the bankrupt.

By the laws of Tennessee, the lien arising from the levy of an attachment is of the same force and effect, both at law and in equity, as a judgment or execution lien.

Hervey and New *v.* Champion, Humphrey's Reports, vol. 11, 569.

Snell & McGavock *v.* Allen, 1 Swan, 208.

Appellees, having secured their lien by the levy of the attachment, were in a condition to set up and claim this security, in their proof of debt, before the Bankrupt Court.

When an attachment is served a lien on the property is created, which nothing subsequent can destroy but the dissolution of the attachment.

Drake on Attachments, sec. 224, 4th ed., and cases there cited.

Where a suit against a bankrupt to enforce a lien is pending at the time of adjudication, the lien creditor may, before any final disposition of such suit, prove his demands in the Bankrupt Court, and have it allowed as a lien claim, with all the rights and privileges belonging to it under the bankrupt law.

Buckman *v.* Dunn & Goss, District Court of Maine, 16 N. B. R., 470.

As the levy ascertained and fixed the lien, and made it of equal force with a judgment or execution lien, the perfecting of the lien by proceeding to judgment was not such a maintenance of suit as is prohibited by the bankrupt act to one proving his claim. His proof of debt with security admitted him as a creditor of the general estate only for the balance of the debt after deducting the value of the incumbered property, to be ascertained by agreement, sale, or in such other manner as the Bankrupt Court might direct.

In this case the value was directed by the Bankrupt Court to be determined by judgment in the court. If appellees, having proved their debt in the Bankrupt Court, were prohibited from proceeding to judgment in a State court by direction of the Bankrupt Court, with as strong reason would a mortgagee who had proved his debt be precluded from foreclosing his mortgage by judgment in a State court. Yet this court in McHenry *v.* La Société Francaise, 95 U. S., 58, adjudged this to be proper, when the consent of the Bankrupt Court had been first obtained.

The Bankrupt Court had jurisdiction to entertain the petition of appellees and grant the relief prayed.

In addition to their jurisdiction over all matters and things in bankruptcy, the jurisdiction of the Bankrupt Court extends, by the terms of the law, to the ascertainment and liquidation of the liens and other specific claims

thereon; to the adjustment of the various priorities and conflicting interests of all the parties, and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all the parties and due disposition of the assets among the creditors, and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and close of the proceedings in bankruptcy.

Ex parte Christy, 3 How., 451.
In re Mallory, 1 Sawyer, 88.
Samson *v.* Clarke, 9 Blatchf., 372.

In the case of Mallory it was expressly decided that the Bankrupt Court had power to declare the lien of a judgment void as against the general creditors.

In re Henry Bernstein, Sup. B. R., 43, after judgment in a State court, advertisement, and sale, the sheriff was restrained.

In re Price Fuller, 1 Sawyer, 43, the District Court of Oregon enjoined a creditor in a State court from enforcing a judgment against the property of the bankrupt.

In the case of Marshall *v.* Knox, 16 Wallace, 553, this court decided that a Circuit Court of the United States, under the concurrent jurisdiction clause of the bankrupt act, had jurisdiction to entertain a bill where the complainants had, before the bankruptcy, commenced an action and perfected a lien against the bankrupt's estate, to decide between the complainants and the claim of the assignee to the property.

In Haughey *v.* Alvin, 2 Bond, 244, the District Court for the Southern District of Ohio decided that a judgment and execution of a State court were void, and that title to the property levied on under the execution vested in the assignee in bankruptcy. Indeed, reference to cases might be extended almost indefinitely, where the Bankrupt Courts have exercised jurisdiction to stay and enjoin parties from

or incumbrance of his property is made within *six* months before the petition, with a view to prevent his property coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat or in any way impair, hinder, impede, or delay the operation or effect of the act, or to evade any of its provisions, the acts are void and the assignee may recover the property, or the value thereof.

Sec. 35, p. 534, vol. 14, U. S. Statutes.

For this reason, among the acts of involuntary bankruptcy which are declared to be void, are the transfer by a debtor of his property with intent to hinder, delay, and defraud his creditors; being bankrupt, or insolvent, or in contemplation thereof, making transfer of his property, or giving any warrant to confess judgment, or procuring or suffering his property to be taken on legal process with intent to give a preference to one or more of his creditors; and the assignee may recover back the property of the bankrupt transferred in violation of this section (39) of the act. And if the person benefited had reasonable cause to believe that a *fraud on the act* was intended, or that the debtor was insolvent, he is not allowed to share in the disposition of the bankrupt's estate by proving his debt in bankruptcy. (Sec. 39, p. 536, vol. 14, U. S. Statutes.)

What is an act in fraud of the bankrupt law? As defined in section 35, it is such an act as will prevent the property of the bankrupt from "coming to the assignee in bankruptcy," or from "*being distributed under this act.*" The creditor is charged with the fraud and the consequences of it when he receives the benefit of the fraudulent acts of the bankrupt, having knowledge of or having reasonable cause to believe they were prohibited by and in fraud of the bankrupt act. A creditor is only charged with the consequence of the act of the bankrupt, when he had notice or knowledge. Can a pri-

ority or security or satisfaction of his debt against the bankrupt, gained by a creditor by a suit in the State court, with full knowledge that the debtor had been adjudicated a bankrupt, be entitled to greater protection than would the same priority, security, or payment, when gained by the act of the debtor, with knowledge on the part of the creditor? If the appellants could, under the bankrupt law, secure this priority by their suit in the State court, then it would be to the advantage of all creditors having subordinate liens or unsecured debts to stay out of the Bankrupt Court and endeavor, by the "race of diligence between creditors," which the act is designed to prevent, to secure satisfaction of their debts and defeat the equitable distribution of the assets of the bankrupt under the law.

This same question was presented to the consideration of this court in the case of Shawhan *v.* Wherritt, 7th Howard, p. 627. There the bankrupt had made, by deed of trust, a fraudulent transfer of his property, and was decreed a bankrupt accordingly, under the bankrupt act of 1841. The defendants to the bill in the District Court of the United States had filed a bill in equity in the State court, charging that the deed of trust was fraudulent and void. After the decree in bankruptcy, the State court adjudged the deed void and decreed the sale of the property; it was sold under the decree, and one of the complainants to the suit in the State court, and a creditor of the bankrupt, became the purchaser of the property at the sale. The assignee in bankruptcy proceeded in the District Court to have the sale declared void, and the property committed to his custody as such assignee. The lower court adjudged in favor of the assignee. Its decree was affirmed on appeal to the Circuit Court, and appeal was then had to this court.

The appellants objected that the decree in bankruptcy did not of itself charge them with notice of the act of bankruptcy, but the question of constructive notice need not be considered in this case before the court, because appellees cannot deny

that they had knowledge of the bankruptcy, in the face of the fact that they served notice on the assignees of the bankrupt to become parties to their suit in the Chancery Court.

After disposing of this question, the court says: "The chief and important question involved in this case, is whether the appellants, after an act of bankruptcy of which they had full knowledge, could, by proceeding in a State court, obtain a valid lien, and seize the property of the bankrupt to the exclusion of the other creditors, or whether such proceeding be not a fraud upon the bankrupt law, and therefore void."

By section 2 of the act of 1841 (Statutes at Large, vol. 5, p. 442) "payments, securities, conveyances and transfers of property" made by the bankrupt to a person having "notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of the act," are in fraud of the act and void. And the court pronounces the obtaining of this decree and the sale of the property of the bankrupt under the decree to be an attempt on the part of one of the creditors to obtain a preference to the injury of others. They declare such conduct to be a fraud on the act, "whose aim is to divide the property equally, and therefore equitably."

It is not denied that the appellants, having commenced their suit in the State court before the petition in bankruptcy was filed, might proceed therewith in the State court unless stayed by the Bankrupt Court. But what we claim is, that when the appellants in the State court, with full knowledge of the bankruptcy, with full knowledge of the prior lien of appellees, and without notice to or knowledge of appellees, obtained the decree of the State court and sold the property thereunder for the satisfaction of their claims, thus securing to themselves a priority to which they would not have been entitled upon the distribution of the assets in the Bankrupt Court, they committed a fraud upon the act, and their proceedings are void.

ABRAHAM & MAYER,
Attorneys for Appellees.

14-578

THE UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

13 orig "J"

Ex Parte J. H. V. Cockcroft.

In Re Calvin Claflin and others,

vs.

The South Carolina Railroad Co. and others.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of J. H. V. Cockcroft respectfully shows—

I. That on or about the day of July, 1878, Calvin Claflin, Cyrus Gatewood, John Parsons, Mary C. Williams, Frank C. Eddy, Benjamin S. Hatch, Thomas R. Burnham, John F. Robinson and William T. Lockwood, holders of Second Mortgage Bonds of the South Carolina Railroad Company, on behalf of themselves and all others claiming under said mortgage, commenced suit in Equity in the Circuit Court of the United States for the District of South Carolina, against the South Carolina Railroad Company, John Hanckel, Robert Adger, Benjamin F. Huger, Trustees, Henry Gourdin, H. Pinckney Walker, Trustees, James S. Gibbes and others, Defendants, praying for the foreclosure of said Second Mortgage and sale of the mortgaged premises, and other relief.

II. That on the 25th day of September, 1880, after a full hearing on the merits, a final decree was pronounced in the
5 said suit, wherein, among other things, it was ordered that in default of payment of interest due by the Company, on or before 1st October, 1880, all the property and rights of property included in the said Second Mortgage, as the same are described in the Deed of Trust of October 1st, 1872, should be sold for cash, as an entirety, and in one parcel, at public auction, in the City of Charleston, in the County of Charleston and State of South Carolina, by or under the direction of John H. Fisher, Esq., the Receiver appointed
6 in the said cause; who was thereby invested with all the powers of a Special Master for that purpose; after advertisement as therein prescribed, and subject to prior liens amounting in the aggregate to £620,000 of principal, including in said amount thirty-three bonds in the hands of the Trustees of the First Mortgage (folios 28 to 33), a copy of which decree is hereto annexed. Folios 1 to 56.

III. From that decree an appeal was taken to the Supreme Court of the United States, and a *supersedeas* was
7 accepted. Afterwards, in the case of *Williams vs. Claflin* (*103 U. S., 753*), it was ordered by the Supreme Court that "the *supersedeas* herein will be so far modified as to allow a sale of the mortgaged premises to be made under the decree."

IV. On the 28th July, 1881, after due advertisement, John H. Fisher, Special Master, exposed the property described in the above decree, for sale, at public auction, sub-
8 ject to the prior liens as provided for in said order; and the said property was knocked down to John S. Barnes, Francis A. Stout, James J. Higginson, Samuel Sloan, and Wm. H. Brawley, Trustees for themselves and associates, at the sum of one million two hundred and seventy-five thousand dollars, who, at the close of the bidding, paid one hundred thousand dollars to said John H. Fisher, Special Master. That thereafter, on 26th August, 1881, the said John H.

Fisher, Special Master, filed his Report of said sale, a copy of which is hereto annexed. Folios 57 to 64. That Exceptions to said Report were duly filed by James Conner, 9
Attorney for W. P. Clyde, Thos. M. Logan and Joseph Bryan, in which Exceptions Messrs. Lord & Inglesby, then the Solicitors of your Petitioner and others, united. Folios 65 to 70. These Exceptions were afterwards withdrawn. Folios 73–267.

V. That on the day of October, 1881, your Petitioner filed a Petition in the Circuit Court of the United States for the District of South Carolina, entitled Ex parte 10
J. H. V. Cockcroft, *in re* Calvin Claflin, et al., Complainants, *vs.* The South Carolina Railroad Company and others, wherein he showed that he was the owner of twenty Non-Mortgage Bonds of the South Carolina Railroad Company, of $500 each; the nature of the association of which the purchasers above named were the Trustees for the purchase of the property; and set forth certain concert agreements and combinations of the said Trustees with parties, whereby bidding at the said sale was prevented, and the said sale 11
was chilled, and the property was bought by the said parties at a fraction of its real value; and prayed "that the order proposed to be asked from the Court confirming the sale reported to have been made, be not granted; but the same may be withheld, and in place thereof that an order may be entered in this case, referring it to a proper officer of this Court to take testimony in regard to the matters set forth in this Petition, and produced to show that there was concert, agreement or combination between parties to the sale, whereby the bidding was chilled, and the price for 12
which the property was knocked down was less than it would have brought without such concert, agreement or combination; that such testimony be reported to this Court, and also any testimony going to show that the bidding at the sale was not fairly made—not in good faith, and not such as entitles the parties by or in whose behalf it was made, to the order of the Court confirming such sale, and vesting in them the right of purchaser or purchasers; and that upon the

coming in of said report this Court may be pleased to order that said sale be set aside, and the property described in the
13 said decree of the 25th September, 1880, be again sold on the same terms and conditions as specified in the said decree; and for such other and further relief in the premises as may be just and proper;" a copy of which Petition with Exhibits is hereto annexed. Folios 77 to 149.

VI. That on the 6th day of October, 1881, the said Report of sale and Exceptions thereto, and Petition of your Petitioner, came on to be heard before the Honorable H.
14 L. Bond, Circuit Judge, and after sundry objections made to the hearing of said Petition by the Counsel for the purchasers, it was agreed that such objections should be overruled on condition that the pending motions should be heard on affidavits, and it was decided to hear the case upon the merits. Whereupon the affidavits of J. H. V. Cockcroft and John D. Alexander were read in support of the Petition, and the affidavits of George Parsons, John D. Alexander, John S. Barnes and William S. Hastie, Jr., and two affidavits of W. H. Brawley, were read in opposition there-
15 to. Copies of said affidavits are hereto annexed. Folios 153 to 256. The Circuit Judge filed an opinion on the merits. Folios 257 to 262. And on 7th October, 1881, entered his decree, wherein, after reciting above proceedings and hearing of the Petition of your Petitioner as aforesaid, he decrees that the Report of sale be confirmed, and the said John S. Barnes, Samuel Sloan, James J. Higginson, Francis A. Stout and William H. Brawley, as Trustees for themselves and associates, be allowed as purchasers of said
16 property at the price reported by the said Special Master as the highest bid therefor, &c. A copy of said decree is hereto annexed. Folios 263 to 279.

VII. That on the said 7th day of October, 1881, upon the announcement of the said decree, your Petitioner filed his Petition as follows:

"And now comes J. H. V. Cockcroft, Petitioner in the above entitled cause, after final decree entered in the mat-

ter of his Petition, and shows to the Court that the matter in dispute exceeds the sum of five thousand dollars; and thereupon the said J. H. V. Cockcroft appeals from the 17
said final decree to the Supreme Court of the United States, to be holden at Washington, at the next term thereof, and the same is accordingly allowed, and the Appellant is ordered to serve the usual citation according to law."

VIII. That thereupon the Hon. Hugh L. Bond, Circuit Judge, disregarding his plain duty and the laws enacted by the Congress of the United States, and after the said Petition filed by your Petitioner, and evidence by affidavit for and against the same, had been heard upon the merits, as 18
set forth in his decree, entered an order as follows:

"This Petition is refused on the ground that the Petitioner is no party to the suit, and does not ask to be made, and no where states that he has proved any bond or claim against the Defendant Company.

"(Signed) HUGH L. BOND.

"*7th October, 1881.*"

IX. Your Petitioner submits that by reason of the said 19
order he has been deprived of his right of appeal to the Supreme Court of the United States, and that he has no remedy except by the Writ of Mandamus requiring the said Circuit Court to allow to the Petitioner the appeal asked for as hereinbefore set forth.

Wherefore he prays that a Writ of Mandamus be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of the United States for the District of South Carolina, requiring the said Circuit Court to allow to 20
the Petitioner the appeal asked for in his Petition filed on 8th October, 1881.

And your Petitioner will ever pray, and so forth.

JOHN WINGATE,
Petitioner's Solicitor.

WM. E. EARLE,
Of Counsel.

STATE OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK,
21 COUNTY OF NEW YORK.

Personally appeared before me J. H. V. Cockcroft, and made oath that the matters and things stated in the foregoing Petition are true, except so far as they are therein stated on information and belief, and those he believes to be true.

J. H. V. COCKCROFT.

Sworn to and subscribed before me this fifth day of January, 1882.

22

JOHN A. OSBORN, [L. S.]
United States Commissioner, S. D. N. Y.

ARGUMENT.

The suit in the Circuit Court in which the final decree that we seek to bring, by appeal, before this Court, was pronounced, was a suit in Equity, in the nature of a creditors'
23 bill, against the South Carolina Railroad Company, an insolvent corporation, and others, for the foreclosure of the Second Mortgage and sale of the mortgaged property, and other relief. The Court took possession of the property by the appointment of a Receiver. A sale was ordered. A combination was formed to purchase the property. The sale was made and the Purchasing Committee bought. The report of sales was filed and excepted to. The exceptors were settled with and withdrew their exceptions. It was alleged that the sale
24 was chilled; that parties were prevented from becoming bidders, and that the Purchasing Committee obtained the property at a fraction of its real value. The Petition of J. H. V. Cockcroft setting up these facts was filed. Objections were at first made to the hearing of the Petition, but "the "Court having, by consent of Counsel for the purchasers, "overruled the last objection on condition that the pend-"ing motions should be heard on affidavits, and having also

"after hearing Counsel overruled the objections to the Peti-
"tion and affidavit, *and decided to hear the case upon the*
"*merits.* And the Counsel for the Petition reading and 25
"filing in support thereof the affidavits of J. H. V. Cock-
"croft and John D. Alexander, and the affidavits of George
"Parsons, John D. Alexander, John S. Barnes and Wm. S.
"Hastie, Jr., and two affidavits of Wm. H. Brawley, being
"read and filed in opposition to said Petition and in support
"of the motion for confirmation, it is now, after hearing Julian
"Mitchell, of Counsel for Complainants, and Thos. G. Shear-
"man, of Counsel for purchasers, in support of the motion
"for confirmation of the report of sale, and in opposition 26
"to said Petition, and A. G. Magrath, Samuel Lord, Jr., B.
"H. Rutledge and John Wingate, Esquires, in support of
"said Petition and in opposition to said motion,

"*Ordered, Adjudged and Decreed,* That the said report do
"stand confirmed, etc." Folios 267–272.

From this decree the Petitioner, J. H. V. Cockcroft, desired to appeal to this Court, and this right of appeal was denied to him.

The general rule is, that all persons having an interest in 27
the subject-matter of a controversy should be made parties, either Plaintiff or Defendant; but there is an exception where such persons are too numerous to be made parties; then, one may represent all in like plight and condition. But, as Lord Eldon said, in *Cockburn vs. Thompson, 16 Vesey, 327,* in reference to hearing claimants who were not named as parties in such causes: "The Court must always be open to questions upon the carriage of the cause."

Suppose (as was actually the case here), that all the bond- 28
holders of the same class as Petitioner, who were really parties defendant, were interested in the purchase, will it be urged that the Petitioner, who is excluded from the benefits of the purchase, should not be heard because he is not a party, and because such other bondholders represent his class? The statement of such a proposition is sufficient for its refutation.

This being a creditors' bill, the Petitioner, holding $10,000 of bonds of the Railroad Company, had an undoubted right
29 to come before the Court and ask the protection of his rights. This he could do by petition, *7 Benedict, 528;* by affidavits, *ex parte; Savery vs. Sypher, 6 Wallace, 159;* or by a bill in equity to set aside the sale, *Slater vs. Maxwell, 6 Wallace, 159; Drury vs. Cross, 7 Wallace, 299.*

The Petitioner having come before the Court by petition and affidavits, and the case having been heard on the merits, it must at least be conceded that he was "treated as a party."
30 Although, perhaps he was not formally made a party, yet his case having gone to a hearing, he will be considered to be a party. *Myers vs. Fenn, 5 Wallace, 207; Harrison vs. Nixon, 9 Pet., 491; Ogilvie vs. Knox Ins. Co., 2 Black, 539; Blossom vs. Railroad Co., 1 Wallace, 655.* This case differs materially from the case where parties prayed for leave to intervene for the purpose of setting aside a decree which has already been pronounced, or for leave to appeal from such a decree. *Ex parte Cutting, 94 U. S., 14.* It also differs from the case of *Sage vs. The Railroad Co., 93 U. S., 412,*
31 where persons not parties were permitted to intervene and were made parties for the purpose of appealing to this Court. The Petitioner has been heard in the Court below on his Petition, and the parties to the suit have put in evidence against the case made by him; the case was heard on its merits and a final decree was pronounced against the Petitioner which would conclude him from ever bringing the matter again before a Court. His only remedy from what he thinks is an erroneous decree would be by appeal to this
32 Court.

The right of appeal of a *party* being a holder of $10,000 of bonds of the Defendant corporation from a decree adverse to his interests is indisputable. This the Act of Congress of 1803 gives to him, not as a favor or in the discretion of the Court, but as a *right.* The words are imperative: the "appeal shall be allowed."

"Mandamus unquestionably is the proper remedy where

the appeal is refused." By Justice Clifford, in *U. S. vs. Gomez, 3 Wallace, 766.*

"We think that an appeal should have been allowed in 33
"this case. The Petitioners were Defendants in the suit
"when the final decree was rendered. *They were directly*
"*interested in what was then decided.* The allowance of an
"appeal under Section 292, Revised Statutes, follows, of
"course, if prayed by one who has the right to it. The
"language of the Statute is '*shall* be allowed,' which means
"'*must* be allowed,' when asked for by one who stands in
"such relation to the cause that he can demand it. The
"question upon such an application is not what will be 34
"gained by an appeal, but whether the party asking it can
"appeal at all.

"It is true that the Petitioners were not parties to the
"suit until after the bill was taken as confessed, but" * * *
(recites reference, report, exceptions, and decree of Circuit Court). * * * "Against these findings certainly the
"Petitioners were in a condition to contend, and, if to con-
"tend below, to appeal here." * * * * * * * * *

"A writ of *mandamus* will be issued, directing the Circuit
"Court to allow the appeal asked for, as of October 2, 1876, 35
"and it is so *ordered.*" By Chief Justice Waite, in *Ex Parte Jordan, 94 U. S., 248.* See also *Ex Parte Railroad Company, 95 U. S., 221.*

The Petitioner in this case was in a condition to contend for his alleged rights in the Circuit Court, and did do so, and the decree which we alone seek to appeal from was pronounced upon the merits after hearing evidence and argument. If the Petitioner was in a condition to contend below, he had also the *right* to have the decision of the Court 36
reviewed by appeal. And we submit this right of appeal will be enforced by a writ of mandamus as prayed for.

Wm. E. Earle
Sol. for Pet:

THE UNITED STATES OF AMERICA,

DISTRICT OF SOUTH CAROLINA,

IN THE CIRCUIT COURT.

IN EQUITY.

Calvin Claflin, Cyrus Gatewood, John Parsons, Mary C. Williams, Frank C. Eddy, Benjamin S. Hatch, Thomas R. Burnham, John F. Robinson and William T. Lockwood, Complainants,

AGAINST

The South Carolina Railroad Company, John Hanckel, Robert Adger, Benjamin F. Huger, Henry Gourdin, H. Pinckney Walker, James S. Gibbes, Francis J. Pelzer, George W. Williams, Andrew Simonds, Louis D. DeSaussure, Charles T. Lowndes, A. O. Andrews, Solomon S. Solomons, Henry A. Middleton, C. H. Manson, David Mordecai, J. Randolph Mordecai, The People's National Bank of Charleston, The First National Bank of Charleston, The Bank of Charleston National Banking Association, The Carolina Savings Bank of Charleston, The South Carolina Loan and Trust Company, The People's Bank of South Carolina, The Union Bank of South Carolina, The Home Insurance Company of Charleston, and The Carolina National Bank of Columbia, James M. Calder, John Gadsden, Jr., Thomas N. Lucas, Franklin R. Hagood, Clarence B. Cochran, Henry Winthrop, John C. Cochran as Execu-

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tor of the Last Will of deceased, Joseph Winthrop as Executor of the Last Will and Testament of
5 *Joseph A. Winthrop, deceased, John B. Lance as Trustee of Mrs. P. A. Lance, Peter C. Gaillard as Treasurer of the F. P. Church, Esther N. Solomons, Edward Magrath, Arthur B. Rose as Trustee, L. C. Mordecai, Jr., The People's Savings Institution, The Union Kilwinning Lodge No. 4 of Ancient Free Masons, Miriam H. Valentine, Thomas W. Porcher, John G. Drayton, The National Bank of Chester, The National Bank of Greenville, The Life Association of America, The Ladies' Calhoun Monu-*
6 *ment Association, John M. Jenkins, Albert Lengnick, John S. Riggs, Charles Macbeth, Margaret C. DuBose, and Bradley T. Johnson, Defendants.*

BILL FOR INJUNCTION AND RELIEF, AND APPOINTMENT OF RECEIVER.

7

DECREE.

This cause coming on to be heard on the pleadings and proofs therein, and upon the Reports of James E. Hagood, Esq., the Special Master, made in pursuance of the orders of this Court, entered in this cause on the 23d day of May, 1879, and on the 9th day of December, 1879, and upon the
8 other proceedings had in this cause, including the petitions filed herein by the People's Savings Institution and the said Defendants known as the South Carolina Railroad Committee or Syndicate, and was argued by Counsel, and, after deliberation being thereupon had—

It is ordered, adjudged and decreed, That the Reports of the said James E. Hagood, Special Master, be confirmed;

and that all conclusions of facts which appear in the tabulated statements of the several bonds, and of the indebtedness of said Company contained in and annexed to said Reports and made a part thereof, be confirmed; saving the exceptions made and filed by the Defendant, Elvira C. Manson, which exceptions are hereby sustained. 9

And it is further ordered, adjudged and decreed, That twenty-three of the bonds secured by Deed of Trust of October 1, 1872, are now in the hands of the said John H. Fisher, the Receiver appointed herein; and that the said Receiver is hereby ordered to cancel the said bonds, and file them with his accounts in this Court. 10

And it is further ordered, adjudged and decreed, That default was made by the said South Carolina Railroad Company in the payment of the installment of interest which accrued upon the said bonds secured by the said Deed of Trust of October, 1872, which became due and payable April 1, 1878; and that the Complainants duly presented the coupons for such installment of interest upon the bonds so aforesaid held and owned by them, and demanded payment thereof, which was refused; and that the installments of interest which have become due and payable upon said bonds since the 1st day of April, 1878, have not been paid by the said Railroad Company, but remain in arrears and unpaid, and the Complainants are entitled to a foreclosure as prayed for in their said Bill; and upon the sale of the mortgaged premises as hereinafter provided, the holders of the Second Mortgage Bonds and Coupons are entitled to their proportionate share of the proceeds of sale; but the holders of the hypothecated Second Mortgage Bonds and Coupons are only entitled to such proportionate share to the extent that may be necessary to pay the debts for which they are respectively held; and that all said bonds sold under pledge carry with them their lien in the hands of purchasers. 11 12

It is further ordered, adjudged and decreed, That the said Deed of Trust was duly recorded in the proper offices for
13 record in the several Counties of the State of South Carolina, through and into which the Railroad of the said South Carolina Railroad Company runs, on the several dates herein named, to wit:

In Charleston County on the 3d day of October, 1872.
In Colleton County on the 28th day of November, 1872.
In Barnwell County on the 1st day of November, 1872.
In Orangeburg County on the 25th day of October, 1872.
In Aiken County on the 19th day of December, 1872..
14 In Richland County on the 7th day of October, 1872.
In Edgefield County on the 23d day of November, 1872.
In Sumter County on the 21st day of November, 1872.
In Kershaw County on the day of

That the same was recorded as a mortgage upon the real estate of the said Company situate in Richmond County, State of Georgia, on the 19th day of October, 1872, but that such record was irregular and insufficient to charge subsequent incumbrancers, and that the said mortgage was properly and sufficiently recorded on the day of August,
15 1878, in said Richmond County, in the State of Georgia, and thereupon became a lien upon the property of the said Company in the several Counties of the State of South Carolina and Georgia herein mentioned, from the date of such legal recording therein respectively.

It is further ordered, adjudged and decreed, That the Defendant, George W. Williams, is a holder of one bond of the said South Carolina Railroad Company, numbered
16 463, purporting to be guaranteed by the State of South Carolina, for the sum of £600; that said bond was pledged to the said Defendants, known as the South Carolina Railroad Committee or Syndicate, as a part of the securities delivered pursuant to the said agreement between the said Defendants and the said Company, and set forth in the Answer of the said Defendants to the Bill herein, as Exhibit "A"; that the said Defendants sold the said bond, and the

said Defendant, George W. Williams, became the purchaser thereof, with notice of the facts attending such pledge.

17

It is further ordered, adjudged and decreed, That on the 1st day of July, 1868, the said Defendant, the South Carolina Railroad Company, made and delivered to the Defendants, Henry Gourdin, H. Pinckney Walker and James S. Calder, as Trustees, a certain Indenture or Deed of Trust referred to in the pleadings as the First Mortgage, a copy of which is annexed to the Bill of Complaint herein, as Exhibit C.

It is further ordered, adjudged and decreed, That the bonds 18
secured by the Statutory liens to the State of South Carolina, created by the Acts of 1837, 1848 and 1865, set out in the pleadings, and also the bonds secured by the Deed of Trust of July 1, 1868, known as the First Mortgage, all of which are prior in rank to the Second Mortgage, shall not exceed in the aggregate the principal sum of £620,000, not including interest, in which aggregate are included the thirty-three bonds held by the Trustees under the First Mortgage as representing the proceeds of the sales of property covered by the lien of the said mortgage. 19

It is further ordered, adjudged and decreed, That at the commencement of this suit the said Defendant, George W. Williams, as Treasurer of the said South Carolina Railroad Committee, was the holder of interest coupons due July 1, 1877, cut from First Mortgage Bonds of the said Company, to the amount of $\$36{,}984\frac{50}{100}$, and of other interest coupons due January 1, 1878, cut from the First Mortgage Bonds of the said Company, to the amount of $\$35{,}425\frac{22}{100}$; and that 20
said Defendant, as such Treasurer, is now the holder of two thousand three hundred and ninety-four coupons of $\$17\frac{50}{100}$ each, detached from bonds secured by the said Deed of Trust of October 1, 1872, due and payable on the 1st day of April, 1877, and is also the holder of two thousand three hundred and seventy-four other coupons for $\$17\frac{50}{100}$ each, detached from bonds also secured by the said Deed of Trust

of October 1, 1872, due and payable on the 1st day of October, 1877, making in all four thousand seven hundred and
21 sixty-eight coupons of said Second Mortgage Bonds, amounting in the aggregate to $83,340, purchased by said Committee under the provisions of the said agreement between them and the said Company, dated March, 1877; that said coupons cut from Second Mortgage Bonds in the hands of the said Committee are existing obligations of the said Company, and entitled to be included as part of the debt of the said South Carolina Railroad Company, secured by the provisions of the said Deed of Trust of October 1, 1872, and to
22 be paid in like manner with other bonds and coupons secured by said Deed.

And, it appearing to the Court that the amount due upon the said coupons cut from said First Mortgage Bonds has been paid by the Receiver appointed in this cause, pursuant to an interlocutory order made by the Court on the 23d day of May, 1879; now, upon hearing the evidence in said cause, from which it appears that the said coupons had been purchased by said Committee with their own funds,

23 *It is further ordered, adjudged and decreed*, That the said payment be confirmed.

It is further ordered, adjudged and decreed, That the levy made by the Sheriff of Richmond County, in the State of Georgia, by virtue of the warrant and attachment granted in the suit of the People's Savings Institution against said Company, upon the real estate of said Company situate in the City of Augusta, and State of Georgia, constitutes a
24 lien upon the said property prior in rank to the lien of the said Deed of Trust of October 1, 1872; but, in order that the said premises may be sold free from the lien of said attachment, the Receiver will pay out of the funds in his hands to the said People's Savings Institution the amount remaining unpaid upon the judgment recovered by them in said attachment proceedings.

It is further ordered, adjudged and decreed, That the petition filed in this cause by George W. Williams, Francis J. Pelzer, James S. Gibbes, Louis D. DeSaussure and Henry Gourdin, claiming a lien by virtue of a judgment recovered in the Superior Court of Richmond County, in the State of Georgia, under certain proceedings on attachment against the South Carolina Railroad Company, be dismissed, and that the property of said Company in the State of Georgia be sold free from such lien. 25

It is ordered, adjudged and decreed, That the premises stated in the pleadings as the Railroad Accommodation Wharf and Torre's Mill property, form a part of the premises embraced in the said Deed of October 1, 1872, known as the Second Mortgage, subject, however, to the prior liens of the said mortgages given respectively to secure portions of the purchase money thereon. 26

And, it appearing to the Court that the said Railroad, and the privileges, franchises, lands, buildings, machinery, rolling stock, real estate, and other property connected therewith, as the same are described in the said Deed of Trust of October 1, 1872, cannot be sold piecemeal or in parcels without great prejudice to the rights and interests of all persons concerned therein, and that the same should be sold as an entirety, 27

It is ordered, adjudged and decreed, That if the said South Carolina Railroad Company do not pay, or cause to be paid, into this Court on or before the 1st day of October, 1880, the interest due and unpaid upon all of said Second Mortgage Bonds issued by said Company, excepting the said twenty-three bonds in the hands of the said Receiver, which has accrued since the 1st day of April, 1878, and the interest upon the interest coupons of said bonds since the dates of their maturity respectively, and, also, all interest coupons of said Second Mortgage Bonds, which are in the hands of said Committee, of the said South Carolina Railroad Company, and interest upon the same from their maturity, and 28

all costs and expenses of the Complainants in this action, then all the property and rights of property included in the
29 said Second Mortgage, as the same are described in the said Deed of Trust of October 1, 1872, to wit: The Railroad constructed and owned by the said South Carolina Railroad Company in the States of South Carolina and Georgia, with all the railway tracks, sidings, bridges and viaducts thereto belonging, and all lands and rights of way thereto incident, not exceeding the space of thirty (30) feet on each side from the centre of the main track, and all lands belonging to the said Company, and used by it for wood and water stations,
30 depots, warehouses, offices, machine shops, car and engine houses, and all locomotives, tenders, cars, stationary engines, tools, materials, machinery, and all other personal property of the said South Carolina Railroad Company necessary to and employed in the working of the said road, and all the rights, privileges and franchises to the said Company belonging; and including the premises known as Railroad Accommodation Wharf and Torre's Mill, subject to the prior lien of certain mortgages given for the purchase money thereof, as hereinbefore decreed, shall be sold for cash as an entirety,
31 and in one parcel, at public auction, in the City of Charleston, in the County of Charleston, and State of South Carolina, by or under the direction of John H. Fisher, Esq., the Receiver appointed in this cause, who is hereby invested with all the powers of a Special Master for that purpose, and who shall receive such compensation for his services herein as may be hereafter ordered. And that the said Special Master give sixty days previous notice of the time and place of such sale, by publishing notices thereof in The
32 News and Courier, of Charleston, and the Journal of Commerce and New York Times, of the City of New York, once in each week for the space of nine weeks next preceding the day of such sale; but such sale shall be expressly declared in the notice thereof, and at the time of the sale of the said premises, and in the conveyance thereof, to be subject to the prior liens of the holders of the bonds prior in rank to the Second Mortgage, not to exceed in the aggregate the

amount of £620,000 of principal, including in said amount the thirty-three bonds in the hands of the Trustees of the First Mortgage. But the purchaser of the said mortgaged premises shall not be personally bound for the payment of any of the prior bonds, or of any balance of the debt that may remain upon the bonds given for the purchase of the property known as Railroad Accommodation Wharf and Torre's Mill, after property mortgaged to secure said bonds is exhausted, if he should not desire to pay off the incumbrances and keep the said property. 33

Provided, however, That such sale shall not include any of the real estate described in Exhibit Number 22, filed with the Master's Report of Testimony, under order of Court of May 23, 1879, formerly belonging to the South Carolina Railroad Company, which said Company, with the consent of the Trustees under the said Deed of Trust of July 1, 1868, had sold and conveyed before the commencement of this action. 34

And it is further ordered, adjudged and decreed, That the said Receiver at the time of making the said sale may, if he believes that a bidder at such sale is not bidding *bona fide* and with ability to comply with the terms of sale, require such bidder, before the property is knocked down, to furnish satisfactory evidence of his ability to pay the cash portion of the purchase money as herein provided for. 35

And it is further ordered, adjudged and decreed, That the said Receiver do report his proceedings at the sale of said mortgaged premises under this order, to this Court, with the amount of the highest bid at said sale, and the name or names of the person bidding the same; and upon the confirmation of such report and the compliance of the bidder with the terms of sale, the said Receiver shall convey to such purchaser by good and sufficient deed, said Railroad and its premises as heretofore described; and that the said South Carolina Railroad Company, and the Trustees under 36

the Deed of Trust of October 1, 1872, shall unite with said Receiver in the execution of the deed.

37 *And it is further ordered, adjudged and decreed*, That the said Defendants and all persons claiming under them, or any or either of them, after the commencement of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, and ordered to be sold, or any part thereof; *Provided, however*, that this shall not affect or impair, or be construed as affecting or impairing, any lien which the hold-
38 ers of the said bonds issued by the Louisville, Cincinnati and Charleston Railroad Company, guaranteed by the State of South Carolina, bearing date the day of ; nor any lien which the holders of the said bonds issued by the said South Carolina Railroad Company, guaranteed by the State of South Carolina, under the said Act of 1848, and bearing date the day of ; nor any lien which the holders of the said bonds issued by said South Carolina Railroad Company, under the provisions of the said Deed of Trust of July 1, 1868; nor any right, title, or interest
39 which the said Henry Gourdin, H. Pinckney Walker and James M. Calder, as Trustees under said Deed of Trust, may have in, to, or upon the said mortgaged premises herein ordered to be sold.

And it is further ordered, adjudged and decreed, That the Defendants, The Life Association of America, The Ladies' Calhoun Monument Association, John M. Jenkins, Albert Lengnick, John S. Riggs, Charles Macbeth, Margaret
40 DuBose and Bradley T. Johnson, as holders of the bonds of the said Company, known as the open or unsecured bonds, and as representing all others in like interest, have not a lien upon the said mortgaged premises or any part thereof, and they are not entitled to share in the security provided by said Deed of Trust of October 1, 1872.

And it is further ordered, adjudged and decreed, That the

net earnings of the said Railroad and other property, since default was made in the payment of the interest upon the said bonds held by the Complainants and by other holders of the bonds, secured by the said Deed of Trust of October 1, 1872, are applicable to the payment of the amounts due thereon; subject, however, to the rights of the holders of the said bonds having a lien upon the said mortgaged premises prior in rank to the lien created by the said Deed of Trust of October 1, 1872, to be first paid out of said net earnings the interest due upon their said bonds, or any principal which may be past due. 41

And it is further ordered, adjudged and decreed, That at the sale of the said mortgaged premises the sum of one hundred thousand dollars in cash shall be paid the said Receiver at the close of the biddings, and the balance of the purchase money shall be paid at or before the confirmation of said sale by this Court. 42

And it is further ordered, adjudged and decreed, That the said John H. Fisher, Receiver, do bring the proceeds of the sale into this Court, by depositing the same with other funds in his hands, as Receiver, subject to the distribution to be made thereof, under the order of this Court, among the persons entitled to the same under the said Deed of Trust, and pursuant to the provisions of this decree; *Provided, however*, that if the holders of any of the said Second Mortgage Bonds should, at the sale of the said railway, franchises, lands, buildings, rolling stock, tools, materials, machinery, and other real and personal property as hereinbefore directed, become the purchaser of the same, he or they may pay the remainder of the purchase money in the Second Mortgage Bonds of the Company, rating each bond at a value which its proportion of the whole purchase money would be if the same were distributed pro rata among the whole number of said bonds. 43 44

And it is further adjudged and decreed, That in the distri-

bution of the net proceeds of sale among the said Second Mortgage Bonds herein decreed to be entitled to share in
45 the same, there shall be paid to all persons who hold said bonds as collateral securities for obligations of the said Company outstanding at the time of the filing of the Bill herein, an equal pro rata share on all the bonds and coupons so held as collateral securities until the amount so paid on said bonds and coupons shall be sufficient to extinguish the amount due on the obligations as collateral securities for which they are so held; and that thereupon the said bonds and coupons shall be delivered up to said Receiver to be
46 filed by him for cancellation under the order of this Court. And in case any of the holders of the said bonds and coupons pledged as collateral securities shall become purchasers at the said sale so ordered, the said bonds and coupons shall be received as part of the purchase money in lieu of cash in like manner as bonds not pledged, but only to an amount which shall not exceed the amount due on the obligation for which such bonds and coupons are pledged.

And it is further ordered, adjudged and decreed, That the
47 Receiver in this cause do, at his discretion, pay out of any funds in his hands derived from earnings, and not needed for the current expenses of the road, the notes of said Company secured by a pledge of any bonds prior in rank to the Second Mortgage Bonds, and that on such payment he do possess himself of said bonds; and that he do thereafter sell so many of said bonds as have not matured, as may be necessary to replace the moneys so paid out by him on the notes secured by said bonds; and that he also do, at his
48 discretion, pay out of such funds not needed for current expenses, any notes bearing interest at a rate exceeding seven per cent. per annum, secured by a pledge of said Second Mortgage Bonds, and that on such payment he do possess himself of said Second Mortgage Bonds so pledged, and that he do thereafter sell so many of the same as may be necessary to replace the moneys so paid out by him upon said notes secured by said Second Mortgage Bonds; and if,

after the payment of said notes secured either by First or Second Mortgage Bonds, and the sale of such bonds sufficient to reimburse him for the moneys expended in such payments, there shall remain in his hands any of the bonds received from the pledgees thereof, he shall file the same with his accounts in this Court, for cancellation, under the order of this Court. 49

It is further ordered and adjudged, That any of the said Defendants who are the holders of notes of the South Carolina Railroad Company, secured by First or Second Mortgage Bonds, or any other parties who have proved in this cause such bonds securing such notes, shall have leave to sell such bonds by placing them in the hands of the Receiver, who is hereby authorized to make such sale in his discretion, and from the proceeds of such sale to pay the claim secured thereby; and if, upon such sale, there be any surplus of bonds so placed in the hands of the said Receiver for sale, he shall file the same with his accounts in this Court, for cancellation, under the order of this Court. And that, saving as hereinabove provided, the injunction as heretofore granted against the negotiation, sale and transfer of said bonds in manner and form as hereinbefore made, be continued; *Provided, however*, that the dissolution of the said injunction, both as to the Second Mortgage Bonds and bonds prior in rank thereto, shall not take effect until sixty days from and after the entry of this decree. And if any party hereto shall within sixty days after the entry of this decree, appeal from the same, and give a *supersedeas* bond as required by law, the said injunction shall be and continue in force until the final determination of the said appeal. 50 51 52

It is further ordered, adjudged and decreed, That thirty-three Domestic Bonds of the said South Carolina Railroad Company, numbered 67, 68, 92 to 105 inclusive, 429 to 438 inclusive, 699 to 703 inclusive, 1588 and 1688, each for the sum of five hundred dollars, held by the said Trustees under the mortgage of July 1, 1868, the same having been pur-

chased out of the funds paid them by the South Carolina Railroad Company as part of the proceeds of lands of said
53 Company sold by it, which were embraced within the premises described by the said Deed of Trust, be delivered up to the said John H. Fisher, the Receiver herein; and that said Receiver do cause said bonds, together with four other Domestic Bonds of like character, numbered 423, 853, 854 and 855, now in his possession, to be cancelled, and when cancelled the same shall be filed by said Receiver in this Court with his accounts.

54 *It is further ordered, adjudged and decreed*, That the People's National Bank of Charleston, Defendant herein, is the holder, by purchase, of the Second Mortgage Bonds of the South Carolina Railroad Company, numbered 2963 to 3042 inclusive, 3196 to 3435 inclusive, 4341 to 4400 inclusive, 5524 to 5543 inclusive—in all four hundred bonds—under the contract with the South Carolina Railroad Company, of date 22d July, 1876; and that the said bonds and coupons thereon are entitled to an equal pro rata distribution of the proceeds of the sale herein ordered.

55

The Complainants having prayed for an appeal from the within decree the same is hereby allowed, and the amount of the *supersedeas* bond is fixed at twenty-five thousand dollars.

M. R. WAITE.

Filed 25th September, 1880.

J. E. HAGOOD,

56 *C. C. C. U. S. Dist. S. C.*

THE UNITED STATES OF AMERICA,

DISTRICT OF SOUTH CAROLINA

CIRCUIT COURT OF THE UNITED STATES,

FOURTH CIRCUIT—IN EQUITY.

Calvin Claflin, Cyrus Gatewood, and Others,

VS.

The South Carolina Railroad Company, and Others.

REPORT OF SALE BY SPECIAL MASTER, JOHN H. FISHER.

To the Judges of the Circuit Court:

In pursuance of the terms of the decree of sale of this Honorable Court in the above cause, filed on the twenty-fifth day of September, A. D. 1880, I duly advertised the property in said decree described for sale, and to be sold on the twenty-eighth day of July, A. D. 1881. I caused notice of the time and place of said sale to be advertised for sixty days previous thereto, by publishing notice thereof in "The News and Courier" of Charleston, and the "Journal of Commerce" and "New York Times" of the City of New York, once in each week for the space of nine weeks preceding the day of such sale.

That in the notice of said sale it was expressly declared that the premises to be sold were subject to the prior liens

of the holders of the bonds prior in rank to the Second Mortgage, not to exceed in the aggregate the amount of
61 six hundred and twenty thousand pounds sterling of principal, including in said amount the thirty-three bonds in the hands of the Trustees of the First Mortgage. Copies of the issues of said papers containing the notice of said sale are herewith filed as a part of this Report, marked respectively Exhibits "A," "B," and "C."

That on the twenty-eighth day of July, A. D. 1881, pursuant to the notice of sale, on the North side of the Post-office, in the City of Charleston, in the County of Charles-
62 ton and State of South Carolina, at the hour of eleven A. M., I proceeded to sell said property.

I first duly read the decree of sale, then the late order of the Supreme Court of the United States authorizing me to proceed under said decree, then said notice of sale as published in the newspapers aforesaid, and then offered the said property described for sale, after the custom of sales at public auction, to the highest bidder; and the said property was knocked down to John S. Barnes, Francis A. Stout, James J. Higginson, Samuel Sloan and W. H. Brawley,
63 Trustees for themselves and associates, at the sum of one million two hundred and seventy-five thousand dollars; said persons named being at said sum the highest bidders upon said property. At the close of the bidding the sum of one hundred thousand dollars in cash was paid to me by said purchasers, and I now hold the same, deposited as directed in the said decree of sale, subject to the distribution to be made thereof under the order of this Court.

Respectfully submitted,

64 JNO. H. FISHER, *Special Master.*

Filed August 26, 1881.

J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

THE UNITED STATES OF AMERICA,

DISTRICT OF SOUTH CAROLINA,

FOURTH CIRCUIT—IN EQUITY.

Calvin Claflin, Cyrus Gatewood, et al., Complainants,

vs.

The South Carolina Railroad Company, et al.

EXCEPTIONS.

Please take notice that the undersigned except to the Report of John H. Fisher, Esq., Special Master, filed on 26th day of August, 1881, and submit that the same should not be confirmed, and that the sale of the South Carolina Railroad reported therein should be set aside, and a new sale made.

First. Because by reason of certain arrangements and combinations entered into before or on the day of said sale, between the person who subsequently bid in the said road and other bidders, or intended bidders, fair competition was prevented, the sale was chilled, and the said persons were enabled to bid in the said property at a fraction of its value.

Second. Because the bidding was chilled by an agreement entered into on the day of the alleged sale, between the purchasers at said sale and one George Parsons who held a judgment against the South Carolina Railroad Company, whereby the said purchasers agreed that they would pay the judgment of the said George Parsons in considera-

tion that the said George Parsons would refrain from bidding at said sale; and by reason of said agreement the said
69 persons were enabled to prevent competition, and to bid in the property at a price far below its real value.

JAMES CONNER,
Attorney W. P. Clyde.
THOS. M. LOGAN.
JOSEPH BRYAN (Bondholder).

On behalf of certain unsecured creditors of the South Carolina Railroad Company we unite in the above exceptions.
70

LORD & INGLESBY.

Filed September 26, 1881.

J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

71

72

THE UNITED STATES OF AMERICA,

73

DISTRICT OF SOUTH CAROLINA,

IN THE CIRCUIT COURT—IN EQUITY.

Calvin Claflin, et al., Complainants,

VS.

74

The South Carolina Railroad Company, et al., Defendants.

NOTICE OF WITHDRAWAL OF EXCEPTIONS.

In the matter of the exceptions to the Report of Jno. H. Fisher, Special Master, filed August 26, 1881,

75

The exceptions of Messrs. W. P. Clyde, T. M. Logan and Joseph Bryan, filed by James Conner, their Attorney, are hereby withdrawn.

JAMES CONNER,
Attorney for W. P. Clyde.
T. M. LOGAN.
JOS. BRYAN (2d Mortgage Bonds).

76

77 # THE UNITED STATES OF AMERICA,

DISTRICT OF SOUTH CAROLINA,

FOURTH CIRCUIT—IN THE CIRCUIT COURT.

Ex Parte J. H. V. Cockcroft.

78 *In Re Calvin Claflin, et al., Complainants,*

AGAINST

The South Carolina Railroad Company, et al., Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the District of South Carolina:

79 The Petition of J. H. V. Cockcroft, a citizen of the State of Connecticut, on behalf of himself and all other creditors of the South Carolina Railroad Company, claiming in the same right, plight and condition with himself, respectfully shows to the Court—

That your Petitioner, J. H. V. Cockcroft, is the owner and holder of twenty bonds of the South Carolina Railroad Company, known as Non-Mortgage Bonds, each for the sum of five hundred dollars, dated the day of ,
80 18 , and numbered respectively 290, 529, 611, 2074, 2075, 2076, 2085, 2087, 2096, 2098, 2249, 2250, 2251, 2958, 2959, 3213, 3304, 3388, 3389, 3399, and having attached thereto and unpaid, coupons becoming due 1st April, 1878, and thereafter semi-annually to this date, each for the sum of seventeen $\frac{50}{100}$ dollars.

That on the 25th day of September, 1880, a decree was made in the above entitled cause for the sale of the proper-

ty of the South Carolina Railroad Company covered by the Second Mortgage thereof; by John H. Fisher, Receiver, on the 28th day of July, 1881, subject to the First Mortgage on said property. 81

That on the said date the said John H. Fisher exposed the said property for sale in accordance with the terms of the said decree, and has made his report stating that the same was purchased by Samuel Sloan, James J. Higginson, Francis A. Stout, John S. Barnes, of the City of New York, and William H. Brawley, of the City of Charleston, at and for the price of one million two hundred and seventy-five thousand dollars, but subject to the First Mortgage on the said property. 82

And that exceptions to the said report were filed in accordance with law by W. P. Clyde, Thomas M. Logan and Joseph Bryan, bondholders, in which the Solicitor of your Petitioner, J. H. V. Cockcroft, and other unsecured creditors, united. All of which will more fully appear by reference to decree for sale, report of sale and exceptions thereto, duly filed in the office of the Clerk of this Court.

That there is a doubt whether matters of fact, which are not mentioned and noticed in the report of sale, and which constitute good and sufficient reasons why the said sale should not be confirmed, can be set forth in exceptions to the report of sale; now, therefore, your Petitioner comes before the Court and causes the same to be informed of the following facts and circumstances, which constitute good and sufficient reasons why the said report of sale should not be confirmed. 83

On the first day of May, 1880, an agreement was entered into by and between the said Samuel Sloan, James J. Higginson, Francis A. Stout and John S. Barnes, of the City of New York, and William H. Brawley, of the City of Charleston, called the Purchasing Committee, parties of the first part, and certain holders of bonds, stocks and obligations of the South Carolina Railroad Company, parties of the second part, whereby the said parties of the first part agreed 84

to purchase the property of the said South Carolina Railroad Company, at the sale to be ordered in this cause, and
85 to make settlement with such of the creditors and stockholders as might become parties to said agreement, according to the terms thereof; a copy of which agreement, but without the signatures of the parties of the second part, is hereto attached and marked Exhibit A.

That thereafter the decree in said cause was filed and the said parties of the first part issued a circular letter, a copy of which is hereto annexed and marked "Exhibit B," whereby the said agreement was modified; and creditors
86 and stockholders were allowed until sixty days thereafter to come in and participate in the benefits of said agreement.

That your Petitioner was prevented from becoming a party to the said agreement within the time therein prescribed.

That your Petitioner is informed and believes that a very large number of the creditors and stockholders of the said Company were permitted to come into the said agreement after the time set forth, and that until a very recent
87 date before the said sale special parties were permitted to come into said agreement, while others, including your Petitioner, were refused.

That shortly before the said sale a large number of stockholders and creditors who were not permitted by the said parties of the first part to become parties to the said agreement were meeting and organizing to protect their interests at the said sale, and, while so meeting, they again made application to be admitted to the said agreement to the
88 said parties of the first part.

That on the 23d day of June, 1881, William H. Brawley, one of the parties of the first part, wrote a letter in the words following, to wit:

"*Messrs. John F. Ficken, E. M. Grimke, William S. Hastie, Jr., and others, Committee:*

"GENTLEMEN—I have the pleasure of informing you

that, in respect to my communication of the 20th, asking the favorable consideration by the Purchasing Committee of your proposed application for admission of the stock 89
of the said South Carolina Railroad Company represented by you to share in the plan of re-organization, I have the following telegram from Mr. John S. Barnes, Chairman, to wit: 'Your letter of the 20th received. The Committee cannot now get a meeting to take final action on outstanding stock, but, individually, they agree to accept outstanding stock which has been prevented from joining in the plan within the prescribed time.'

"I will confer with you as soon as I hear further from Mr. 90
Barnes in regard to the steps necessary to be taken for deposits of stock, etc.

I am, very respectfully,

WM. H. BRAWLEY.

"*Charleston, S. C., July 23, 1881.*"

That the said letter was placed on the said 23d day of July, 1881, for public information, on the bulletin-board of "THE NEWS AND COURIER," a newspaper published in Charleston, S. C., and was published in the said newspaper 91
on Monday, 15th July, 1881.

Your Petitioner further shows that he is informed and believes that, relying on the good faith of the said parties of the first part to act up to their individual agreement, as communicated by their Chairman, the said parties ceased to organize separately for the protection of their interests, but applied, as did also Petitioner, to be admitted to the benefits of said agreement; but the said parties give evasive answers to said requests. 92

That your Petitioner further shows that he is informed and believes that the said actings, doings and refusals of the said parties of the first part were made and done for the purpose of preventing organization of said parties for protecting their interests by bidding at said sale, and that the effect thereof was to chill the said sale.

Your Petitioner further says, that he is informed and

believes that since the filing of the said report and exceptions thereto, the said parties of the first part have agreed to
93 admit W. P. Clyde, Thomas M. Logan and Joseph Bryan, some of the exceptors, to the benefit of the said agreement if they would withdraw, so far as they were concerned, the exceptions with which the Solicitor of your Petitioner united; and an agreement has been made to that effect.

Your Petitioner further says, that he is informed and believes that on the 28th day of July, 1881, one George Parsons who held a judgment debt of the said South Carolina Railroad Company, was by his Agents, present at said
94 sale ready and prepared to become a bidder thereat, and comply with the terms of sale, and announced to the said parties of the first part that he intended to bid on the said property to the sum of at least three millions of dollars over said first mortgage, and that thereupon and to prevent the said George Parsons from becoming a bidder at said sale, and the said property from bringing its real value, the said parties of the first part agreed to pay the said judgment if the said George Parsons would abstain from bidding at said sale. And an agreement was thereupon
95 made to that effect. That by reason of the said agreement the said sale was chilled, and the property of the said Company was bid in by said parties of the first part at one million two hundred and seventy-five thousand dollars; a price greatly under its real value, and about one-third less than would have been bid on the same if such agreement had not been made.

Your Petitioner further shows that he is informed and believes that the property of the South Carolina Railroad
96 Company which was so exposed for sale is of the value of at least eight millions of dollars, and that under the agreement the said parties of the first part were to issue more than that amount of bonds to be secured by mortgages of said property and its income.

Wherefore, your Petitioner on behalf of himself and all other creditors of the South Carolina Railroad Company, who are in like right, plight and condition with him, prays

that the order proposed to be asked from the Court confirming the sale reported to have been made, be not granted; but that the same may be withheld, and in place 97
thereof, that an order may be entered in this case referring it to a proper officer of this Court to take testimony in regard to the matters set forth in this Petition, and produced to show that there was concert, agreement or combination between parties to the sale whereby the bidding was chilled, and the price for which the property was knocked down was less than it would have brought without such concert, agreement or combination; that such testimony be reported to this Court, and also any testimony going to 98
show that the bidding at the sale was not fairly made, not in good faith, and not such as entitles the parties, by or in whose behalf it was made, to the order of the Court confirming such sale, and visting in them the right of purchaser or purchasers; and that upon the coming in of said report this Court may be pleased to order that said sale be set aside, and the said property described in the said decree of 25th September, 1880, be again sold on the same terms and conditions as specified in the said decree, and for such other and
further relief in the premises as may be just and proper. 99

S. LORD, JR.,
Petitioner's Solicitor.

A. G. MAGRATH,
B. H. RUTLEDGE,
JOHN WINGATE,
Of Counsel.

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100

EXHIBIT A.

PLAN FOR THE RE-ORGANIZATION OF THE SOUTH CAROLINA RAILROAD COMPANY.

THIS AGREEMENT, made this first day of May, 1880, between Samuel Sloan, James J. Higginson, Francis A. Stout, John S. Barnes, all of the City of New York, and William H. Brawley, of the City of Charleston, South Carolina, herein called the Purchasing Committee, party of the first part, and the subscribers hereto, holders of the bonds, stock and obligations of the South Carolina Railroad Company, parties of the second part.

WITNESSETH: The said parties of the first part are hereby constituted and appointed a committee on behalf of all the holders of said bonds, stock and obligations of said Railroad Company, who shall sign this agreement, and shall be called The Purchasing Committee; they shall have full power to fill any vacancy created in their number by death or resignation, and any person elected to fill any vacancy shall have all the power and authority conferred by this agreement upon an original member of said committee.

Said Purchasing Committee may act in all cases by a majority of their number, and are hereby authorized and empowered to do any and all acts which may be lawfully done and which shall be advised by counsel as necessary to the complete execution of this agreement, and may settle, compromise and adjust any and all claims arising during the prosecution of this plan, and which may in their judgment be necessary to the effectual execution of the true intent and purposes of this agreement.

They may employ such counsel and agents as they may deem necessary to expedite and facilitate the execution of this agreement and plan, and shall determine and provide

for the payment of counsel fees and for services rendered in connection therewith; they may, in their discretion, extend the term for the performance of any and all things and 105
acts herein provided to be done and performed, and may permit any one who may have had the right to become a party hereto, but who has been prevented from so doing, to become a party hereto upon his complying with the terms hereof.

Upon any sale of the property of said Railroad Company under judicial decree of foreclosure, or under any judgment obtained against said Company, said Purchasing Committee may, through an agent or in their own proper names, or in 106
the names of any or either of them, purchase the railways of the South Carolina Railroad Company, its franchises, appurtenances, property and equipment, at such prices as shall seem to them expedient, and may take any action or proceeding to obtain the title, ownership and possession of all the property of said Company of whatever nature wherever situated.

Said Purchasing Committee shall have full power and authority by right of said purchase, to organize a Company under the same name or under any other name, in such 107
manner as they shall be advised by counsel is legal and proper, to which Company shall be conveyed, transferred and delivered, the said Railroads and all the property, rights, privileges, franchises and interests so acquired by them for the considerations and upon the terms and subject to the conditions and restrictions of this agreement.

In consideration of such conveyance and transfer to said Company, said Company shall convey to such trustee or trustees as said Purchasing Committee shall select, by a good 108
and sufficient Mortgage Deed of Trust, all of the property so acquired, *in trust*, to secure an issue of First Consolidated Mortgage Bonds, having forty (40) years to run, bearing interest at the rate of six (6) per centum per annum, payable semi-annually on the first days of April and October of each year, whereof the first coupon shall be due on the first day of April, 1881, principal and interest payable in gold coin of

the United States, of standard weight and fineness. Said Company shall make, execute and deliver said bonds under
109 said mortgage to said Purchasing Committee, to an amount not to exceed the sum of Four Million Five Hundred Thousand Dollars ($4,500,000), of such numbers and denominations as may be convenient and necessary to effect the exchanges and payments as hereinafter provided.

In further consideration of said conveyance and transfer to said Company, said Company shall convey to such trustee or trustees as said Purchasing Committee shall select, by a good and sufficient Mortgage Deed of Trust, but sub-
110 ject to the lien of the First Consolidated Mortgage aforesaid, all of the property so acquired, in trust to secure an issue of Second Mortgage Six Per Cent. Bonds, having fifty years to run, bearing interest at the rate of six (6) per centum per annum, payable semi-annually on the first days of January and July of each year, whereof the first coupon shall be due on the first day of July, 1881, principal and interest payable in lawful money of the United States.

Said Company shall make, execute and deliver said bonds under said Second Mortgage Deed of Trust to said Purchas-
111 ing Committee, to an amount not to exceed the sum of Two Million Dollars ($2,000,000), of such numbers and denominations as may be convenient and necessary to effect the exchanges and payments as hereinafter provided.

In further consideration of such conveyance and transfer to said Company, said Company shall convey to such trustee or trustees as said Purchasing Committee shall select, by a good and sufficient Mortgage Deed of Trust, but subject to the lien of the First Consolidated Mortgage, and to
112 the lien of the Second Mortgage Deed of Trust aforesaid, all of the property so acquired, in trust to secure an issue of Income Six Per Cent. Bonds, having thirty (30) years to run, of such denominations as shall be deemed necessary, to an amount not to exceed the sum of Two Million Dollars ($2,000,000). Said Income Bonds shall be entitled to receive interest at a rate not to exceed six (6) per centum per annum, payable only if earned out of the net earnings of

said Company in any one year, after payment of prior interest charges, taxes, assessments, ordinary repairs and replacements, and such interest shall not accumulate from year to 113
year, but so much thereof as shall be earned shall be paid. It is agreeed and understood that the said Company shall retain the right, to be expressed in the Mortgage Deed of Trust securing said Income Bonds, to retire the same in part by lot, or in whole, at any time after five years from the date of their issue, by paying the principal and accrued interest thereon.

In further consideration of such conveyance and transfer to said Company, said Company shall make, issue and de- 114
liver to said Company, Certificates of Common Stock of said Company to the amount of Five Million Eight Hundred and Twenty-two Thousand Two Hundred Dollars ($5,822,200). The total consideration for the conveyance of said Railroad, its property, franchises and equipment as herein provided to be paid by said Company to said Purchasing Committee, being as follows:

First Consolidated Mortgage Bonds.....	$4,500,000
Second Mortgage Six Per Cent. Bonds.....	2,000,000
Income Six Per Cent. Bonds.....	2,000,000
Common Stock.....	5,822,200

115

The subscribers hereto, parties of the second part, now holders of the Second Mortgage Bonds of said Company, hereby agree that within ninety (90) days from the date hereof, they will deposit with the Farmers' Loan and Trust Company of the City of New York said Second Mortgage Bonds with all past due coupons attached, to the amounts 116
and of the numbers placed opposite their names respectively, taking receipt therefor, stating that such bonds and coupons are deposited to the order of the said Purchasing Committee for the uses and purposes of this agreement; and they hereby agree to accept from said Purchasing Committee in lieu of said bonds so deposited and of such receipt, upon the completion of the re-organization of said Com-

pany under this plan, the new First Consolidated Mortgage Bonds as hereinbefore provided to be issued, to an amount
117 equal to the principal and accrued interest upon said bonds, interest thereon to be calculated to the 30th day of September, 1880, inclusive.

The subscribers hereto, parties of the second part, holders of the so-called Non-Mortgage Bonds, do hereby agree that within ninety (90) days from the date hereof they will deposit with the said Farmers' Loan and Trust Company, the said Non-Mortgage Bonds, with all past due coupons thereto attached, to the amounts and of the numbers as placed
118 opposite their names respectively, taking receipt therefor stating that such bonds and coupons are deposited to the order of said Purchasing Committee for the uses and purposes of this agreement; and they hereby agree to accept from said Purchasing Committee in lieu of said bonds and coupons so deposited and of such receipt, upon the completion of the re-organization of said Company under this plan, the new Second Mortgage Six Per Cent. Bonds as hereinbefore provided to be issued to the amount of fifty (50) per cent. of the nominal value of said Non-Mortgage Bonds, in-
119 terest thereon to be calculated to the 30th day of September, 1880, inclusive; also, of said Income Six Per Cent. Bonds herein provided to be issued, thirty (30) per cent. of the nominal value of said Non-Mortgage Bonds; and of the stock of said Company hereinafter provided to be surrendered to said Purchasing Committee, twenty (20) per cent. of the nominal value of said Non-Mortgage Bonds.

The subscribers hereto, parties of the second part, holders of notes, debts and obligations of said South Carolina Rail-
120 road Company, secured or claimed to be secured by the pledge of certain bonds of said Company, do hereby agree that within ninety days from the date hereof they will deposit with the Farmers' Loan and Trust Company, such evidences of indebtedness as may be in their possession, together with the collateral security held by them, taking receipt therefor, and will duly assign and transfer the same to said Purchasing Committee for the uses and purposes of

this agreement; and they hereby agree to accept from said Purchasing Committee in full consideration of and payment for such indebtedness, upon the completion of the re-organ- 121
ization of said Company, the new Second Mortgage Six Per Cent. Bonds as hereinbefore provided to be issued to an amount equivalent to fifty (50) per centum of the nominal or face value of such indebtedness, interest thereon to be calculated and allowed to the 30th day of September, inclusive; also, of said Income Six Per Cent. Bonds hereinbefore provided to be issued, thirty (30) per cent. of the nominal or face value of said indebtedness,—and of the stock of said Company hereinafter provided to be surrendered to said 122
Purchasing Committee, twenty (20) per cent. of said nominal or face value of said indebtedness.

The subscribers hereto, holders of the common stock of said Company, do hereby agree that within ninety days after the date hereof they will deposit with said Farmers' Loan and Trust Company, taking receipt therefor, certificates of stock held by them to the amounts and of the certificate numbers as placed opposite their names respectively, and will duly assign and transfer the same to the said Purchasing Committee for the uses and purposes of this 123
agreement.

And they do further agree that, upon making such deposit and transfer they will deposit with said Farmers' Loan and Trust Company in cash, to the order of said Purchasing Committee, Ten Dollars ($10) for each and every share of One Hundred Dollars ($100) so deposited, taking receipt therefor; and it is hereby agreed that they shall receive, and they hereby agree to accept in lieu of said stock, eighty (80) per cent. of the par value of the deposited stock in the new common stock of said Company as hereinbefore pro- 124
vided to be issued, surrendering to said Purchasing Committee twenty (20) per centum of the stock deposited, for the uses and purposes of this agreement; and, in consideration of said cash payment, it is hereby agreed that they shall receive, and they each severally agree to accept, a like amount in the new Second Mortgage Six Per Cent. Bonds

hereinbefore provided to be issued, and in consideration of the surrender of the said twenty (20) per centum of the stock
125 so deposited, they shall receive the Income Six Per Cent. Bonds hereinbefore provided to be issued, to an amount equivalent to the stock so surrendered. Interest upon the cash payments shall be allowed to the 30th day of September inclusive, and it is hereby agreed that any depositor of stock under this agreement who may desire to pay the said 10 per cent. in cash, in instalments, shall be permitted to pay the same during the period of five months after subscribing to this agreement by paying 20 per cent. thereof
126 upon depositing his stock, and 20 per cent. each month thereafter until the whole shall be paid, interest to be charged against such deferred payment at the rate of six (6) per centum per annum.

And it is further agreed and understood, that the right to pay said $10 per share in cash, and to exchange said twenty (20) per centum of common stock for said Income Bonds, shall be extended to all stockholders of said South Carolina Railroad Company for a period of ninety days from the date hereof; but, if at the expiration of that period there
127 shall not have been deposited the whole of the share capital of said Company, and the cash payment therein shall not have been made or agreed to be made, the subscribers hereto who have made such payment shall be entitled to surrender to said Purchasing Committee, out of the stock which shall have been deposited by them as aforesaid, an additional amount of said stock, *pro rata*, in proportion to the amount so subscribed by them respectively, and to receive in lieu thereof a like amount of said Income Bonds; provided that
128 they each pay in cash a sum equivalent to fifty (50) per cent. of the par of the additional stock so surrendered, and agree to accept for such cash payment a like amount in the said new Second Mortgage Six (6) Per Cent. Bonds hereinbefore provided to be issued. The intention of this and the foregoing provision being that the total amount of cash to be paid by stockholders of said Company shall be about Five Hundred and Eighty-two Thousand Dollars ($582,000),

and the total amount of stock surrendered shall be about One Million One Hundred and Sixty-four Thousand and Four Hundred Dollars ($1,164,400), for which there shall be 129
delivered to the stockholders making such payment and surrender, $582,000 of said Second Mortgage Six (6) Per Cent. Bonds, and $1,164,000 of said Income Bonds.

The stock of said Company herein referred to is understood to be the Bank and Road Shares, the Road Whole Shares each to be taken as of the nominal or par value of One Hundred Dollars each, also the unconsolidated Half Shares of the nominal or par value of Fifty Dollars each. The total amount being equivalent to 58,222 shares of One 130
Hundred Dollars each.

In case the whole amount of the Capital Stock of the existing Company shall not be subscribed hereto, so that after satisfying and discharging all the obligations of the Purchasing Committee, undertaken by them under this agreement, there shall remain a surplus of the new Capital Stock which is herein provided to be issued to the said amount of Five Million Eight Hundred and Twenty-two Thousand Two Hundred Dollars ($5,822,200), such surplus stock shall be cancelled, either by said Purchasing Commit- 131
tee or by the new Company, as may be advised by counsel, and the total amount of the Capital Stock of said new Company shall be fixed and determined to be such an amount as shall have been delivered to the stock, bond and debt holders subscribing to this agreement and entitled to receive the same under the terms and conditions hereof.

And it is further agreed and understood, that such holders of the common stock of the existing Company as shall not, within ninety days after the date hereof, sign this 132
agreement and make the surrender and cash payment as herein provided, shall not be entitled to receive any benefit of this re-organization.

It is further agreed and understood, that of the Four Million Five Hundred Thousand Dollars ($4,500,000) of First Consolidated Mortgage Bonds herein provided to be issued, an amount equal to the amount of existing bonds,

which constitute a prior lien to the existing Second Mortgage Bonds, shall be delivered to and held by the trustee
133 or trustees under the said First Consolidated Mortgage, and are not to be issued or sold or otherwise disposed of except for the sole purpose of exchange at par for the bonds known as the

Louisville, Cincinnati and Charleston Railroad Company First Mortgage Bonds, guaranteed by State of South Carolina, amounting to £19,200 @ $4.85	$ 83,120.00
134 South Carolina Railroad Company, First Mortgage Sterling Five (5) Per Cent. Bonds, amount outstanding £310,750 @ $4.85, say	1,507,139.50
South Carolina Railroad Company First Mortgage Sterling Seven (7) Per Cent. Bonds, amount outstanding, domestic, say	1,106,869.11
	$2,707,128.61

135 Said Consolidated Bonds so reversed may be sold to provide the means to take up and pay such of said prior issues as may be due and payable, or to pay such of said prior issues as may become due and payable hereafter. All such prior bonds, upon being so retired, either by exchange or by payment of the principal sum, to be cancelled.

It is further agreed and understood that of the Four Million Five Hundred Thousand Dollars ($4,500,000) of the said First Consolidated Mortgage Bonds, and Two Million Dollars ($2,000,000) of said Second Mortgage Six Per Cent.
136 Bonds, which may be issued as hereinbefore provided, only such amounts shall be issued as are required to effect the retirement and exchanges of securities as hereinbefore provided, together with an amount of First Consolidated Mortgage Bonds amounting to One Hundred and Fifty Thousand Dollars ($150,000), and an amount of Second Mortgage Six Per Cent. Bonds amounting to Two Hundred Thousand Dollars ($200,000); which amounts, together with

the cash paid by the stockholders, after satisfying and discharging all the obligations and expenses of the said Purchasing Committee incurred under and in pursuance of the 137
terms of this agreement of re-organization, shall be transferred and delivered to the new Company or to its order only in such manner as to ensure the expenditure of said surplus of cash, and of the proceeds of such surplus bonds upon the road bed of said Company and upon such other permanent improvements and increase of equipment and terminal facilities and connections as shall be deemed necessary to the proper working of the lines and facilitating the efficient management of its traffic; such disposition of said 138
cash and securities to be secured in the mortgage deeds of trust hereinbefore provided to be made or in such other manner as the said Purchasing Committee may be advised is legal and proper.

The said Purchasing Committee are hereby authorized and empowered to use any and all bonds, securities or evidences of indebtedness deposited under this agreement, in payment for the Railroads and other property of said South Carolina Railroad Company, at any sale under foreclosure or in pursuance of any judicial decree. 139

All copies of this agreement which shall be subscribed by any person entitled to do so, and shall be delivered to the Purchasing Committee, shall have the like effect as if their signature were hereto subscribed.

No member of said Purchasing Committee shall be held liable for any ignorance or mistake of law or fact, or for any act, default or omission of any other member of the Committee, or of any trust company, trustee, bank or banker, attorney or any other agent or instrument of said Committee 140
or of said Railroad Company.

Said Purchasing Committee are hereby authorized and empowered to supply any deficiency in the matter of detail not herein specially provided, but which may hereafter arise pending the re-organization, and which may be advised by counsel, and which may be necessary, proper and expedient to carry out or to facilitate the true intent and purposes of this agreement.

This agreement shall become binding and have full force and effect whenever there shall have been secured the sig-
141 natures of the holders of a majority of the existing bonds, stock and debts of the said Railroad Company.

In witness whereof, the parties aforesaid have hereunto set their hands the day and year first above written.

EXHIBIT B.

142

SOUTH CAROLINA RAILROAD COMPANY.

Notice to Stockholders, Bondholders and other Creditors:

The Purchasing Committee, appointed by an agreement between stockholders, bondholders and other creditors of
143 the South Carolina Railroad Company, dated May 1, 1880, regret to announce that, owing to the great change in the situation of the Company's affairs, caused in part by the decree of the United States Circuit Court in the foreclosure suit, and in part by the discovery of large outstanding obligations of the Company not entered upon its books, it will be impracticable for the Committee to carry out the plan of re-organization, according to its present terms, in case they purchase the road. The outstanding valid First and
144 Second Mortgage Bonds recognized by the decree of the Court far exceed the limit of First Consolidated Mortgage Bonds allowed by the existing plan of re-organization.

It will, therefore, be absolutely necessary, if the Committee are to purchase the road, and it is not to be unduly weighted with fixed interest charges, nor deprived of all means to make necessary improvements, that the Committee's powers should be enlarged, that the unsecured

creditors should accept Income Mortgage Bonds of the re-organized Company, and that the amount of the First Consolidated Mortgage Bonds should be increased, while that 145
of the Second Mortgage Bonds should be correspondingly diminished.

The Committee, accordingly, have drawn up a modification of the plan of re-organization (which will be found at the office of the Farmers' Loan and Trust Company, No. 26 Exchange Place, New York, and also at the office of Mr. John S. Barnes, Chairman, No. 18 Wall Street), which they earnestly request may be signed by all the parties to the existing agreement. At the same time, all receipts hereto- 146
fore given by the Committee, under the present plan of re-organization, must be exchanged at the office of the Farmers' Loan and Trust Company for new receipts, issued under and in conformity to the amended agreement.

Until these receipts are thus exchanged, the Committee deem it unsafe for them to bid at the sale of the road; and, if the sale should occur before such exchange is complete, the most which the Committee can do for their beneficiaries will be to collect from the proceeds of the sale the proportion belonging to the various securities deposited with them. 147

The general result of the modifications proposed by the new arrangement is as follows:

	Present Plan.	*Proposed Plan.*
First Mortgage.....	$ 4,500,000	$ 5,000,000
Second "	2,000,000	1,500,000
Third "	2,000,000	3,000,000
Stock "	5,822,200	4,657,760
	$14,322,200	$14,157,760

148

Unless within sixty days from this date the new agreement is signed and the receipts exchanged, the Committee will consider themselves discharged from all obligation to bid at the foreclosure sale, and cannot undertake to do more than to solicit proper cash bids from outside parties, and

see that the surplus is distributed according to the legal priorities of the Mortgage bondholders.

149 JOHN S. BARNES,
SAMUEL SLOAN,
JAMES J. HIGGINSON,
FRANCIS A. STOUT,
WM. H. BRAWLEY,
Purchasing Committee.

New York, Jan. 17, 1881.

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150 THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA,
FOURTH CIRCUIT—IN THE CIRCUIT COURT.

Ex Parte J. H. V. Cockcroft.

In Re Calvin Claflin, et. al., Complainants,
AGAINST
151 *The South Carolina Railroad Company, et. al., Defendants.*

To Messrs. Mitchell & Smith, W. D. Porter, H. E. Young, George R. Walker, A. T. Smythe, T. M. Hanckel, Simonton & Barker, DeSaussure & Son, Bryan & Bryan, C. R. Miles, Brawley & Barnwell, D. T. Corbin and Sherman & Sterling:

Please take notice, that on the motion, of which we have received notice, to confirm the report of sales in above en-
152 titled cause, we will present the within Petition, and will move the Circuit Court to grant an order of reference as prayed for therein.

LORD & INGLESBY,
Petitioner's Solicitor.
A. G. MAGRATH,
B. H. RUTLEDGE,
JOHN WINGATE,
Of Counsel.

THE UNITED STATES OF AMERICA,

153

DISTRICT OF SOUTH CAROLINA,

FOURTH CIRCUIT,

IN THE CIRCUIT COURT—IN EQUITY.

Calvin Claflin, et al., Complainants,

154

VS.

The South Carolina Railroad Company, et al., Defendants.

The State of Connecticut:

Before me, personally appeared, J. H. V. Cockcroft, who being duly sworn, says that he is the owner of twenty Non-Mortgage Bonds of the South Carolina Railroad Company, 155
numbered respectively, Nos. 3899, 3389, 3388, 3304, 3213, 2959, 2958, 2251, 2250, 2249, 2096, 2098, 2085, 2087, 2074, 2075, 2076, 611, 529, 290, each for the sum of five hundred dollars, and each having attached thereto and unpaid coupons payable semi-annually, from the first day of April, 1878, for the sum of seventeen $\frac{50}{100}$ dollars each.

That some time in the year 1880, an agreement was made by and between Samuel Sloan, James J. Higginson, Francis A. Stout, John S. Barnes, all of the City of New York, and 156
William H. Brawley, of the City of Charleston, and as parties of the first part, and certain parties holders of bonds, stock and obligations of the South Carolina Railroad Company of the second part, whereby the said parties of the first part agreed to purchase the property of the South Carolina Railroad Company, to be sold under the decree in above entitled cause; and make settlement with the parties

of the second part, in accordance with the terms of said agreement.

157 That deponent is informed and believes that the said agreement specified that such creditors who desired to take part in the said agreement should come in and be parties thereto on or before the first day of October, 1880, but this deponent is informed and believes that a very large number of those creditors and stockholders which have signed the said agreement did so with the permission of the said parties of the first part, after the said date.

That deponent is informed and believes that up to a very
158 short time before the sale of the road special parties were allowed to become parties to the said agreement, although other persons who held the same class of securities were denied such privilege.

That at the time when the said agreement was entered into, and until after the said first day of October, 1880, deponent was absent from his home in the State of Connecticut, he being at that time travelling in Europe, and he knew nothing of said agreement or of the proceedings in this cause.

159 That on his return to his home, and after he had heard of the said agreement, he applied to the said parties of the first part to admit him to participate therein, and the said parties of the first part, while they did not refuse to admit him so to participate in the benefits of said agreement, have from time to time returned him evasive answers to his requests.

That deponent is informed and believes that many of the parties who were holders of bonds and stock of the said
160 Company, and who had not entered into the agreement with the said parties of the first part, on or before the said first day of October, 1881, and who refused to sell their securities at greatly reduced prices to parties whom the said parties of the first part would admit into the said agreement, met and were taking measures to protect their interests, and in so doing again requested the said parties of the first part to admit them to the benefits of the said agreement.

That on the 23d day of June, 1881, William H. Brawley, one of the parties of the first part, wrote a letter in the words following, to wit: 161

Messrs. John F. Ficken, E. M. Grimke, William S. Hastie, Jr., and others, Committee:

GENTLEMEN—I have the pleasure of informing you that in response to my communication by the Purchasing Committee, of your proposed application for admission of the stock of the South Carolina Railroad Company represented by you, to share in the plan of reorganization, I have the 162
following telegram from John S. Barnes, Chairman, to wit: "Your letter of the 20th received. The Committee cannot "now get a meeting to take final action on outstanding "stock, but individually they agree to accept all outstand- "ing stock which has been prevented from joining in the "plan within the prescribed time." I will confer with you as soon as I hear further from Mr. Barnes in regard to the steps necessary to be taken for deposits of the stock, &c.

I am, very respectfully,

WM. H. BRAWLEY. 163

Charleston, S. C., July 23, 1881.

That the said letter was placed at once for public information on the bulletin board of "THE NEWS AND COURIER," a newspaper published in Charleston, S. C., on the 23d day of July, 1881, and was also published in the said newspaper on Monday, the 25th July, 1881.

That this deponent is informed and believes that relying upon the good faith of the said parties of the first part, to 164
act up to their individual agreement as communicated by their Chairman, the said parties ceased to organize separately for the protection of their interests, but applied, as did also deponent, to be admitted to the benefits of the agreement, but the said parties of the first part still continue to give evasive answers.

That this deponent is informed and believes that the said

actings and doings of the said parties of the first part, were made and done for the purpose of preventing organization
165 of said parties from protecting their interests by bidding at said sale, and that the effect of the same was to chill the said sale.

This deponent further says, that he is informed and believes, that on the twenty-eighth day of July, 1881, one George Parsons, who held a judgment debt of the said South Carolina Railroad Company, was, by his agents, present at said sale, ready and prepared to become a bidder thereat, and comply with the terms of sale; and announced to the
166 said parties of the first part that he intended to bid on the same an amount sufficient to cover his judgment, and that thereupon, and to prevent the said George Parsons from becoming a bidder at said sale, and the said property from bringing near its real value, the said parties of the first part agreed to pay the said judgment, if the said George Parsons would abstain from bidding thereon. That by reason of the said agreement the said sale was chilled, and the property of the said Company was bid in by said parties of the first part at a price greatly under its real value.

167 This deponent further says, that he is informed and believes that the property of the said South Carolina Railroad Company which was exposed for sale as above set forth, was of the value of at least eight millions of dollars, and that under the agreement the parties of the first part are to issue more than eight million dollars of bonds, to be secured by mortgages of the same, and of the income thereof.

(Signed) J. H. V. COCKCROFT.

168 Sworn to before me, the 3d day of October, 1881.

[L. S.] (Signed) JOHN A. OSBORN,
U. S. Commissioner.

In Re Calvin Claflin, et al.,

vs.

The South Carolina Railroad Company, et al.

169

Ex Parte J. H. V. Cockcroft.

THE STATE OF SOUTH CAROLINA,
COUNTY OF CHARLESTON.

John D. Alexander being duly sworn, says, I am a broker 170
and auctioneer in the City of Charleston, in business with John C. Cochran, under the firm of Cochran & Alexander; I know Mr. George Parsons, of the City of New York, who was a judgment creditor of the South Carolina Railroad Company, as he informed me; Messrs. Buist & Buist represented George Parsons in his said judgment; I remember the sale, under the decree in this cause, of the property of the South Carolina Railroad Company on the 28th day of July, 1881, by John H. Fisher, Esq., Receiver. There was 171
correspondence between my firm and Mr. Parsons in connection with that sale—one letter of instructions, and others referring to that letter.

The following is the letter of instructions read from original produced:

"NEW YORK, 25th July, 1881.

"*Messrs. Cochran & Alexander, Charleston:*

"DEAR SIRS—Enclosed you have Certificate of Deposit in Bank of the Republic for $100,000. The Committee have 172
declined to pay the judgment in my favor, and I am determined to have my money or the Road. I desire you to bid for the property $6,010,000, including the amount of First Mortgage Bonds. I suppose the First Mortgage may amount to $2,900,000, so you will bid $3,110,000 over and above the First Mortgage. The Co. is in the fix of a man that owes $6,000,000 and has, or thinks he has $10,000,000

or $15,000,000 to pay it with. Such folks ought to be made to pay their debts. Yours truly,

173 "(Signed,) GEORGE PARSONS.

"[OVER.]

"Please telegraph me Wednesday that you have received the check, or so soon as you get it. Telegraph me Thursday the result of the sale. If you have to use the check, all right; if you don't use it, please return it as promptly as possible, say Thursday night. If it comes in
171 your way, show the check to Fisher, Buist and Brawley, that they may know what to expect. G. P."

I communicated to Mr. Brawley and Mr. Buist that I had received the check, and told them that I was instructed to bid on the property. Showed the check to those two gentlemen, and stated what amount I was directed to bid on said property. I told those gentlemen that if the claim of Mr. Parsons was not arranged satisfactorily to me, as the Agent of George Parsons, that I would bid the property up
175 to the limit of $3,110,000 over the First Mortgage, as I was directed to do. The claim which I represented for George Parsons was arranged to my satisfaction by Mr. Brawley, representing the Purchasing Committee—Mr. Brawley undertaking that whatever was Mr. Parsons' claim he should receive. I received this assurance from Mr. Brawley at the place of sale, and while Mr. Fisher was reading the decree to the crowd assembled. I accepted that assurance of Mr. Brawley as satisfactory to me, and without that, I would
176 have made the bid, and I did not bid because of that assurance. Mr. Brawley in this represented the Purchasing Committee, and I treated with him as such; he was one of them. Previous to Mr. Brawley's advising me, he had told me that he was expecting instructions, and could not say what he would do until he received them. Met Mr. Brawley at sale; he approached me at the sale, and then told me he was awaiting instructions, and would see me again. I remained

still prepared to carry out my instructions. A few minutes after Mr. Brawley again approached me; he gave me a sign to indicate to me that the Committee would make the 177
arrangement with me as required by George Parsons. The meaning of said sign had been indicated beforehand. I then pushed my way to Mr. Brawley, not willing to remain satisfied simply with the sign given by Mr. Brawley, and I asked him if he would give every assurance that the matter would be arranged to my satisfaction, and Mr. Brawley said he would. With that I was satisfied, and because of that I did not bid. I communicated with my principal what I had done, and he approved thereof. 178

My instructions were to bid up to the limit of the letter or have the claim arranged, and without that I would have made the bid of $3,110,000 over the First Mortgage.

(Signed,) JNO. D. ALEXANDER.

Filed 6th October, 1881.

Sworn to before me this 6th day of October, 1881.

(Signed,) J. E. HAGOOD,
C. C. C. U. S. Dist. S. C. 179

180

181 THE UNITED STATES OF AMERICA,

DISTRICT OF SOUTH CAROLINA,

FOURTH CIRCUIT—IN THE CIRCUIT COURT.

In Re Calvin Claflin, et al.,

182 VS.

The South Carolina Railroad Company, et al.

Ex Parte J. H. V. Cockcroft.

John D. Alexander being duly sworn, says, I have this day made an affidavit herein at the request of counsel for Mr. Cockcroft.

183 Mr. William H. Brawley did not, at any of the interviews between us mentioned in that affidavit, ask me to abstain from bidding at the sale therein referred to, or promise that the judgments therein referred to would be taken care of as a condition of my not bidding; I had no conversation on these subjects with any one except Mr. Buist and Mr. Brawley and my partner, Mr. Cochran; Mr. Buist was counsel for Mr. George Parsons; no one ever asked me to abstain from bidding at the sale, nor did I ever promise to any one that

184 I would so abstain. Mr. Brawley told me in substance at our first interview, some three (3) or four (4) days before the sale, that he had always been in favor of admitting Mr. Parsons' judgments into the re-organization scheme; I cannot now remember distinctly whether Mr. Brawley told me then that he expected the counsel for the Committee to come down in a few days with authority to settle the matter, but I heard in some way that such counsel were coming down,

and I cannot name any person who was likely to be able to give me that information except Mr. Brawley. I don't know what has been done by the Purchasing Committee about 185
the judgments before mentioned.

(Signed,) JNO. D. ALEXANDER.

Filed 6th October, 1881.

Sworn to and subscribed before me this 6th October, 1881.

(Signed,) J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

186

Calvin Claflin, et al.,

vs.

The South Carolina Railroad Company, et al.

UNITED STATES OF AMERICA,)
SOUTHERN DISTRICT OF NEW YORK.)

187

George Parsons, of the City of New York, being duly sworn, says:

1. I have had, at all times during the calendar year of 1881, a controlling interest in three judgments against the South Carolina Railroad Company; one in favor of myself for $2,800.46, one in favor of J. C. Maben for $3,490.25, and the third in favor of Leslie Chase for $3,487.60. The two latter judgments were recovered upon overdue coupons of 188
the Second Mortgage Bonds of the said Company.

2. Neither I, nor Mr. Maben, nor Mr. Chase, had ever been made parties to the above entitled suit, in which the property of the said Company was decreed to be sold, and in consequence thereof, our equity of redemption would not be cut off by such sale, as I am advised and believe.

3. I am, and have been for several years, the owner of a number of Second Mortgage Bonds of the said Company,
189 with coupons attached, which I deposited some time ago with the Farmers' Loan and Trust Company, of the City of New York, subject to the control of the Purchasing Committee appointed under the plan of re-organization, signed by a majority of the holders of the Second Mortgage Bonds and other securities of the said Company; and I was admitted, so far as my interest in the said bonds and coupons was concerned, to all the benefits of the said plan of re-organization.

190

4. I applied to the said Purchasing Committee, before the sale of the Road, to admit me to a further interest in the plan of re-organization, to the extent of the judgments hereinbefore referred to, stating the aforesaid facts to Mr. Brawley, one of the Committee, with whom I was personally acquainted. He informed me that he thought that such application would be favorably received, but referred me to Mr. John S. Barnes, Chairman of the Committee, for a final answer. Owing to the absence of Mr. Barnes from the City,
191 I was unable to have any interview with him on the subject, and, therefore, as a matter of precaution, I wrote to my Agents at Charleston, Messrs. Cochran & Alexander, to bid at the sale of the Road an amount sufficient to cover the judgments controlled by me as aforesaid, in addition to the Second Mortgage Bonds and coupons, unless the offer I had made in New York to Mr. Brawley was accepted.

(Signed,) GEORGE PARSONS.

192 Filed 6th October, 1881.

Subscribed and sworn to before me this first day of October, 1881.

(Signed,) JOHN A. GARVER, [L. S.]
Notary Public, New York.

Calvin Claflin, et al.,

AGAINST

The South Carolina Railroad Company, et al.

193

UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA.

William H. Brawley being duly sworn, says:

194

1. I am one of the Purchasing Committee, appointed under a plan of reorganization assented to by much more than nine-tenths of all the holders of the stock and securities of the South Carolina Railroad Company, affected by the decree of foreclosure in this suit; and I was present at the sale of said Railroad under the said decree, on July 28, 1881, and bought the same for account of the said Purchasing Committee.

195

2. Some time before the sale, Mr. George Parsons addressed me in regard to his interest in certain judgments recovered against the South Carolina Railroad Company on coupons of its Second Mortgage Bonds. He desired to have such judgments admitted to the benefit of the scheme of re-organization, and I gave him to understand that the Purchasing Committee was likely to assent to his request, although I had no authority myself to give such assent; and I referred him to Mr. John S. Barnes, the chairman of the Committee. No meeting of the Committee, as such, was 196 held from that time until July 28th, 1881, so far as I am aware.

3. Shortly before the sale, I learned from Mr. John D. Alexander that he expected to receive authority from Mr. George Parsons to bid at the sale, to an amount sufficient to cover the Second Mortgage Bonds and the judgment

owned by Mr. Parsons, but no more, and this only in case Mr. Parsons' proposition to the Purchasing Committee,
197 through me, was not accepted. On the day of the sale, I learned from Mr. Alexander that he had received such authority; I told him that I would let him know in the course of the day whether Mr. Parsons' interests in those judgments would be protected; and shortly afterwards I indicated to him that this would be done. But I did not request him to abstain from bidding at the sale; and he did not in any way promise to do so.

198 4. In making the final promise to Mr. Alexander to protect Mr. Parsons' judgments, I was only carrying to completion the original partial understanding between Mr. Parsons and myself; and the only reason why my answer was delayed until that time was that I did not previously receive any instructions from Mr. Barnes, the chairman of the Committee, who resided in New York, while I resided in Charleston, and I could not do so until after conference with the Counsel of the Committee, who arrived in Charleston the day before the sale, and who had authority
199 from Mr. Barnes and the members of the Committee to act in such matters in concurrence with me.

5. Mr. George Parsons informed me that he had no real desire to purchase the said Railroad; he was not, in any proper sense, a real bidder at the sale; and Mr. Alexander, of course, acted only as his agent. I entered into no agreement with them or with any other person that they or any person should abstain from bidding at the sale; and I did
200 nothing whatever to chill the bidding or prevent competition, or reduce the price bid at such sale, unless the facts hereinbefore stated involve such inference, which I believe that they do not. No other member of the Purchasing Committee, and no person interested in my bid, was present at the said sale, or for a long time previous thereto; and to the best of my knowledge, information and belief, no persons so interested with me entered into any such agree-

ment or did anything to chill the bidding or prevent competition; and I believe I am fully acquainted with all the facts affecting that question. I append hereto a true copy 201
of a letter written and mailed by me to Mr. Parsons on the day of sale.

(Signed) WM. H. BRAWLEY.

Subscribed and sworn to before me, this sixth day of October, 1881.

(Signed) J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

202

(COPY.)

CHARLESTON, 28TH JULY, 1881.
SOUTH CAROLINA.

MY DEAR SIR—I have prevailed upon the Committee to receive your judgments, *i. e.:* those standing in your name and in that of Maben and Chase, which were recovered on Second Mortgage Coupons, into the plan of re-organization, on same footing with Second Mortgage Bonds. 203

There has been some difficulty and delay about it owing to the fact that the Committee has been so scattered that it was difficult to get authority; but there will be no further difficulty.

The Committee stipulate, however, that if it is found that the 1st Consolidation Mortgage Bonds provided for in the schedule of re-organizatoin are insufficient to carry out all purposes of re-organization, they shall have the right to pay the amount in cash instead of giving you new bonds. 204

This is a condition which I suppose is not objectionable.

Yours truly, &c.,
WM. H. BRAWLEY.

To Mr. Geo. Parsons.

You will have learned the particulars of to-day's sale probably by telegraph before this reaches you.

Calvin Claflin, Cyrus Gatewood, and Others, Complainants,

vs.

205 *The South Carolina Railroad Co., and Others, Defendants.*

UNITED STATES OF AMERICA, }
SOUTHERN DISTRICT OF NEW YORK. }

John S. Barnes, being duly sworn, says:

206 1. I reside in the City of New York, and am Chairman of the Purchasing Committee on whose behalf the South Carolina Railroad was purchased at the sale made under the decree of foreclosure and sale in this cause; and I am familiar with the proceedings of that Committee since its formation, and with the plan of re-organization under which it was appointed and has acted.

2. That said Committee was appointed by an instrument in writing, commonly called the Plan of Re-organization
207 of the South Carolina Railroad, dated May 1, 1880, a copy of which is hereto annexed, marked "A," and which was amended by another instrument in writing, dated January 1, 1881, a copy of which is hereto annexed, marked "B."

3. The said Purchasing Committee having had a large discretion intrusted to them by the said instruments, have always construed them as intended to admit into the benefits of the proposed re-organization all *bona fide* holders
208 of the securities and stock of the South Carolina Railroad Company upon the just and equitable terms stated; and the Committee have, therefore, used their best efforts to extend the benefits of such re-organization to all such persons; and none have been excluded who made application in due season. The result is, that all the persons interested in the said Railroad before this suit was brought have had it placed in their power to retain their interest, notwithstand-

ing the decree of foreclosure and sale herein; and more than nineteen-twentieths of them in value have retained their interest for themselves and their assigns. The sole 209
object of the combination thus formed was to secure to all persons interested in the sale of the said Road a larger amount in real value than could possibly be obtained by means of a sale without such combination. It was not intended to depress the price of the Road, but to secure to the parties interested the utmost advantages which could be gained by any sale.

4. The purchase of the Railroad made by this Committee 210
on July 28, 1881, was made by them in trust for the benefit of all the parties to the said plan of re-organization; and, if the sale is confirmed, the property will be held for the benefit of such parties constituting nineteen-twentieths of the stockholders and creditors of the existing corporation.

5. The proposition of Mr. George Parsons to be admitted to the benefit of the said plans of re-organization was never rejected by the Purchasing Committee; and no meeting of the Committee was held between the time when I first heard 211
of that proposition and July 28, 1881, owing to the absence of some of its members from the City.

6. Mr. Maben, one of the judgment creditors acting with Mr. Parsons, called upon me shortly before the day of sale and inquired of me whether the judgment in his favor, and in favor of Mr. Parsons, would be taken into the scheme of re-organization. I told him that the Committee had not acted upon the question, and that I had no authority to 212
decide it; and so far from offering him any inducement not to bid at the sale, I recommended him to raise the amount necessary to make a bid, and to bid an amount sufficient to cover his judgment in case the Committee should be unable to take action on his proposition. He told me positively that he and his friends did not want to bid; that they had no desire to purchase the Road, and that their interest in

the scheme of re-organization was already so large that they earnestly desired its success, but that they claimed the right
213 to come in with their judgments. I told him I had no knowledge of the facts concerning the judgments and could not then decide the question, and, therefore, again advised him to be prepared to bid at the sale, in case the Committee should not come to a decision before that day.

(Signed,) JOHN S. BARNES.

Subscribed and sworn to before me, this fourth day of October, 1881.

(Signed) JOHN A. GARVER, [L. S.]
214 *Notary Public, New York.*

Exhibit A is the same as Exhibit A to Petition of J. H. V. Cockcroft, with the following added thereto:

EXHIBIT SHOWING APPROXIMATELY THE CONDITION OF THE SOUTH CAROLINA RAILROAD ON MAY 1ST, 1880, AND OPERATION
215 OF THE PROPOSED PLAN OF RE-ORGANIZATION.

Statement of Debt.

Louisville, Cincinnati & Charleston R. R. Co., guaranteed by State of South Carolina..	£ 15,000	
South Carolina R. R. Bonds, guaranteed.....	4,200	
South Carolina R. R. Bonds, First Mortgage..	310,750	
	£329,950@4.85	$1,600,259.50
South Carolina R. R. Bonds, Sterling Domestic	2,000	9,369.11
216 South Carollna R. R. Bonds, First Mortgage Domestic		1,097,500.00
Total Amount First Mortgage.....		$2,707,128.61
South Carolina R. R. Second Mortgage Valid, Approximate.....	$1,206,500.00	
Three Years' Interest to October 1st, 1880	253,365.00	
Approximate Amount, Second Mortgage..		1,459,865.00
Total Amount First and Second Mortgages		$4,166,993.61

South Carolina R.R. Non-Mortgages (estimated)	$1,119,000.00		
Three Years' Interest to October 1st, 1880	234,990.00		
		1,353,990.00	217
South Carolina R. R. Floating Debt (estimated), including Interest to October 1, 1880		900,000.00	
South Carolina R. R. Capital Stock		5,822,200.00	
TOTAL LIABILITIES		$12,243,183.61	

Proposed Issues under Plan of Re-organization.

FIRST MORTGAGE CONSOLIDATED SIX PER CENT. BONDS		$4,500,000.00	
Appropriated, viz:			
For First and Second Mortgages	$4,166,993.61		
For Improvement and Equipment Fund	150,000.00		218
For Contingencies	183,006.39		
	$4,500,000.00		
SECOND MORTGAGE SIX PER CENT. BONDS		2,000,000.00	
Appropriated, viz:			
For Non-Mortgage Claims	$ 676,995.00		
For Floating Debt	450,000.00		
For Stock Assessment of 10 per cent	582,220.00		
For Improvement and Equipment Fund	200,000.00		
For Contingencies	90,785.00		
	$2,000,000.00		
INCOME SIX PER CENT. BONDS		2,000,000.00	219
Appropriated, viz:			
For Non-Mortgage Claims	$ 406,197.00		
For Floating Debt	270,000.00		
For Stock Surrendered	1,164,440.00		
For Contingencies, if required	159,363.00		
	$2,000,000.00		
CAPITAL STOCK		5,108,558.00	
Appropriated, viz:			
For Exchange of Original Stock	$4,657,760.00		
For Non-Mortgage Claims	270,798.00		
For Floating Debt	180,000.00		220
	$5,108,558.00		
TOTAL STOCK AND BONDS		$13,608,558.00	

Recapitulation.

	FIRST AND SECOND MORTGAGES		$4,166,993.61
221	Provided for by 1st Con. Mtge. Bonds	$4,166,993.61	
	NON-MORTGAGE CLAIMS		1,353,990.00
	To be cancelled by 50 per cent. in 2d Mtge. Bonds	$ 676,995.00	
	To be cancelled by 30 per cent. in Income Bonds	406,197.00	
	To be cancelled by 20 per cent. in Common Stock	270,798.00	
	FLOATING DEBT		900,000.00
	To be cancelled by 50 per cent. in 2d Mtge.		
222	Bonds	$ 450,000.00	
	To be cancelled by 30 per cent. in Income Bonds	270,000.00	
	To be cancelled by 20 per cent. in Common Stock	180,000.00	
	CAPITAL STOCK		5,822,200.00
	To be exchanged for equal amount of New Stock, 80 per cent.	$4,657,760.00	
	Cancelled by 20 per cent. of Income Bonds, for surrendered stock	1,164,440.00	
	Total of existing liabilities		$12,243,183.61
223	Total of proposed new issues		13,608,558.00
	Showing surplus of new issues		$ 1,365,374.39
	Composed of the following items:		
	FIRST CONSOLIDATED MORTGAGE BONDS.		
	Reserved for Improvement and Equipment Fund	$ 150,000.00	
	Reserved for Contingencies	183,006.39	$ 333,006.39
	SECOND MORTGAGE BONDS.		
	Reserved for Improvement and Equipment		
224	Fund	$ 200,000.00	
	Reserved for Contingencies	90,785.00	290,785.00
	INCOME BONDS, reserved for Contingences		159,363.00
	CASH, accruing from 10 per cent. assessed on Stock		582,220.00
			$1,365,374.39

EXHIBIT B.

225

THIS AGREEMENT, made the first day of January, 1881, by and between John S. Barnes, Samuel Sloan, James J. Higginson, Francis A. Stout and William H. Brawley, as a Purchasing Committee, named in a certain other agreement in writing, dated the first day of May, 1880, parties of the first part, and the several parties whose names are subscribed hereto, holders of receipts of the said Purchasing 226
Committee to the amounts set opposite their names respectively, of the second part :

WITNESSETH : Whereas, after the written agreement aforesaid, dated May 1, 1880, was entered into, the United States Circuit Court for the District of South Carolina, in equity, in a suit brought by Calvin Claflin and others against the South Carolina Railroad Company, and others, for the foreclosure of the Second Mortgage on the property of the said Company, adjudged and decreed that the entire issue
of $3,000,000 of bonds under the said Second Mortgage, so far 227
as the same remain outstanding in the hands of certain *bona fide* holders and pledgees mentioned in the said decree, are good and valid bonds, entitled to the benefit of the said mortgage, and that all of such bonds which have been sold by the pledgees, carry with them to the purchaser the benefit of the lien of the said mortgage, but that holders of hypothecated bonds are only entitled to share in the proceeds of the sale, under the decree, as may be necessary to
pay the actual indebtedness secured by pledge of such 228
bonds ;

And, whereas, the effect of the said decree is to bring within the protection of the said Second Mortgage, and within the benefit of any sale under foreclosure thereof, an amount of bonds largely in excess of that provided for under the written agreement aforesaid (which is commonly called and is hereafter referred to as the plan of re-organiza-

tion); and, in consequence thereof, the amount of bonds provided by the said plan to be issued under the First Con-
229 solidated Mortgage is inadequate to provide for the First and Second Mortgage Bonds actually outstanding, and adjudged to be entitled to the benefit of the sale;

And, whereas, the holders of the floating debt, secured by the pledge of Mortgage Bonds, as aforesaid, have agreed with the parties of the first part, to accept in satisfaction of their claims payment of the principal and interest thereof, one-third in cash, and two-thirds in new First Consolidated Mortgage Bonds of the re-organized Company;

230 And, whereas, it may be desirable to re-organize the affairs of said corporation without a foreclosure sale, or without organizing any new corporation, for the sake of preserving valuable franchises and privileges belonging to the existing corporation;

And, whereas, it is advisable that the said plan of re-organization should be so amended as to give to the Purchasing Committee full power to conform to the terms of the said decree, and to the existing circumstances of the Company, and to secure a full and perfect title to its pro-
231 perty;

Now, therefore, it is agreed between the parties hereto as follows:

First. That the amount of First Consolidated Mortgage Six Per Cent. Bonds, to be issued by the re-organized Company, may be increased by the consent of the Purchasing Committee to such amount not exceeding $5,000,000 in all, as may be necessary:

232

1. To take up and exchange for, or provide for the payment of such bonds as are by the said decree declared to be a lien upon the property and franchises of the South Carolina Railroad Company prior to the said Second Mortgage Bonds.

2. To take up or exchange for, or provide for the pay-

ment of the Second Mortgage Bonds, by the said decree declared to be good and valid bonds.

233

3. To provide for the settlement, adjustment or payment of so much of the floating debt of the said Company as is secured by the pledge of First or Second Mortgage Bonds.

Second. That Second Consolidated Mortgage Six Per Cent. Bonds may be issued by the re-organized Company to such amount not exceeding $1,500,000 in all, as may be necessary:

234

1. To deliver to Stockholders, at par, for the assessment of ten per cent. paid by them under the plan of re-organization, with interest thereon at six per cent.

2. To provide an improvement, equipment and contingent fund, not to exceed the sum of $400,000, in such bonds at par; which amount, or so much thereof as may remain after defraying the obligations and expenses of the said Purchasing Committee, shall be delivered to the re-organized Company for the uses and purposes stated in the said 235
plan.

3. To deliver to the trustees named in such mortgage the remainder of such bonds, to be by them held in trust, for the sole purpose of exchanging for or providing the means to pay so much of the existing First Mortgage Bonds of the said South Carolina Railroad Company as may become due and payable, and as are not provided for by the issue of First Consolidated Mortgage Bonds hereinbefore 236
provided for.

Third. That Income Mortgage Six Per Cent. Bonds may be issued by the re-organized Company to such amount, not exceeding $3,000,000 in all, as may be necessary:

1. To provide for the payment of the principal and interest of the Non-Mortgage Bonds outstanding.

2. To provide for the stock surrendered by Stockholders depositing their stock, and paying the assessment of ten per
237 cent. thereon, in accordance with the terms and conditions of said plan of re-organization.

3. To provide an improvement, equipment and contingent fund, not to exceed the sum of $250,000 in such bonds at par; which amount, or so much thereof as may remain after defraying all the obligations and expenses of the said Purchasing Committee, shall be delivered to the re-organized Company for the uses and purposes in the said plan
238 stated.

Fourth. That such of the subscribers hereto as hold, own or control receipts issued by the said Purchasing Committee, will forthwith return to the Farmers' Loan and Trust Company all such receipts, and will accept thereof other receipts of like general tenor, entitling them to the securities provided by this agreement, and in conformity thereto.

Fifth. That such of the subscribers hereto as are holders
239 of Non-Mortgage Bonds, or have deposited such bonds in exchange for receipts of the said Purchasing Committee, shall accept, in exchange for such receipts, or upon the deposit of such bonds, receipts of the said Committee entitling them to Income Mortgage Six Per Cent. Bonds, as provided by the said plan of re-organization and by this agreement, equal in amount to the principal and interest due upon said Non-Mortgage Bonds; interest to be calculated to October 1, 1880.

240

Sixth. That the said Purchasing Committee, in addition to the powers granted to them by the said plan of re-organization shall have power to use the surplus bonds, and the cash assessments paid by the stockholders of the said Company to such extent as may be necessary to effect a complete settlement of the affairs of the Company, and to secure to the re-organized Company a clear and perfect title to all

the property of the existing Company; and the said Committee are authorized, in their discretion, to settle and adjust any claims against the Company, and to carry out the 241
scheme of re-organization in the name and by means of the existing corporation, or of a new corporation, as they may deem expedient; and the powers and authority of said Purchasing Committee, as granted under the said plan of re-organization, are hereby continued in full force and to the same effect as though no change had been made therein except so far as the same are herein modified or extended; and, except as herein modified, the said plan of re-organization is hereby assented to and confirmed. 242

Seventh. That this agreement shall be deemed and taken to be part of the said plan of re-organization, with the same effect as though the said plan were embodied herein and modified to the extent hereinbefore set forth; and that the said Purchasing Committee may rescind this agreement at any time if it is not signed by all the parties to the original plan of re-organization.

Eighth. That any copy of this agreement may be signed 243
and delivered to the Purchasing Committee with the same effect as if the original were so signed.

In witness whereof, the parties above named have hereunto set their hands the day and year first above written.

Filed 6th October, 1881.

J. E. HAGOOD,
C. C. C. U. S. Dist. S. C. 244

THE UNITED STATES OF AMERICA,

DISTRICT OF SOUTH CAROLINA.

FOURTH CIRCUIT—IN EQUITY.

Calvin Claflin, et al.,

VS.

The South Carolina Railroad, et al.

Ex Parte J. H. V. Cockcroft.

Personally appeared before me Wm. S. Hastie, Jr., who being duly sworn, deposes and says, that he has read the Petition of J. H. V. Cockcroft, and that he is a member of the Committee alluded to in the letter of Wm. H. Brawley, set forth on the fourth page of the above printed Petition.

That his Committee did apply for admission to the benefits of the said agreement, and that negotiations, which he believes will be satisfactory to his Committee, were made, and he denies that any evasive replies have been made to his Committee by the Purchasing Committee, or by any one connected therewith, which have prevented them from bidding at the sale.

That there was nothing whatsoever in the transactions between his Committee and the Purchasing Committee, which created a suspicion that their acceding to the requests of his Committee would warrant the belief that their action towards his Committee was with a view to prevent an organization of the Stockholders, which his Committee represents, from bidding at said sale.

That his Committee, or the Stockholders which his Com-

mittee represents, did not, so far as he knows, ever at any time contemplate organizing for the purpose of bidding at the sale alluded to in said Petition. 249

WM. S. HASTIE, JR.

Sworn to before me this sixth day of October, A. D. 1881.
ISAAC HAYNE, *Notary Public.*

Calvin Claflin, et. al.,

AGAINST

The South Carolina Railroad Company, et. al. 250

Ex Parte J. H. V. Cockcroft.

William H. Brawley, of the City of Charleston, being duly sworn, says:

1. I have read the Petition of J. H. V. Cockcroft, and the statements contained in folios 15 to 17 thereof, relating 251
to certain communications between deponent and a Committee of Stockholders. So far as they represent that action therein referred to was taken for the purpose of preventing an organization of Stockholders for protecting their interest by bidding at the sale of the South Carolina Railroad, are entirely untrue, both in fact and in inference.

2. I was moved to take an interest in such Stockholders by the statements made to me that for the most part they were incapable of any efficient organization for their own 252
protection, many of them being represented to me to be widows, minors and trustees, and other persons of small means, who appealed to the Committee on that very ground to do something which would prevent the sacrifice of their small interest, which could not be saved except through the liability of the largest Stockholders allowing them to become parties to the re-organization; all of which statements I believe to be true.

3. I never did or said anything to deter any Stockholders from bidding at the sale of the Road, and the Stockholders' Committee never informed me that they had any intention so to bid; and I was informed and believed, and still believe, that it was not in their power or intention so to bid, whether they were admitted to the re-organization scheme or not; and the very fact that they were thus left without remedy except through the favorable action of the Committee, inspired my efforts in their behalf, which had commenced long before the day of sale, and which were begun and continued without any reference to the possibility of their completion at the sale, which I always regarded as exceedingly improbable.

4. The time for all Stockholders and creditors of the South Carolina Railroad Company to come into the plan of re-organization, was extended by public notice until March 28th, 1881, and no application made in accordance with that plan was rejected or evaded before that date. Mr. Cockcroft never made any application to me to be admitted into the scheme, and to the best of my knowledge and belief he never made any such application until after the sale; and my belief in this respect is confirmed by my knowledge of the fact that the Committee extended the time for all holders of Non-Mortgage Bonds to come into the scheme until the very day of sale.

5. That the sum of $3,110,000 would not, to the best of my belief, cover anything found due from the South Carolina Railroad Company except the Second Mortgage Bonds and interest thereon, and floating debt secured by the pledge of such bonds, and the judgments, if indeed that sum would be sufficient for that purpose.

WM. H. BRAWLEY.

Sworn to before me October 6th, 1881.

J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

OPINION.

257

It appears that after the decree for the sale of the South Carolina Railroad, certain persons, holders of its stocks, bonds and obligations, entered into a combination, placing their securities in the hands of a Committee, who were to bid for the Railroad such an amount at the sale as the value of the securities it held would justify. In this combination there was nothing fraudulent, and so far from being so it 258
gave opportunity to those who had little interest in the obligations of the Company to compete with the larger holders in bidding for it, and tended to make it bring a larger price than could have been otherwise realized.

It appears from the Petition of Cockcroft that he was out of the United States, and did not enter into the combination, though sixty days by advertisement was given of the intention of the Bondholders and Stockholders to form it. It was not necessary for the combination to be advertised. 259
It would have been quite legal to form it without public notice, and the Committee was not bound to admit the Petitioner into it after the sixty days had expired, even if they were indulgent enough to admit others who had failed also to take advantage of the terms of the advertisement.

How large the amount of the Road's securities the Committee should hold was a purely business question for the Committee of Stockholders to decide.

That the Committee agreed with Mr. Parsons that the obligations of the Railroad he held should form part of the 260
securities held by them is no evidence of fraud. It does not appear from the evidence that he was asked to refrain from bidding, or that any such agreement prevented a just sale at the best price.

It would take a great deal of evidence to convince me that Mr. Parsons, as the Petitioner alleges, allowed a Railroad, for which he stood ready to give $3,000,000, to be

sold for half that amount, because a valid claim of his for $12,000 was secured.

261 To set aside this sale on the suggestion of one small Bondholder, without any stipulation or security on his part that at a resale the same price will be obtained, will do great injustice to all the other holders of its securities. It is for the interest of all concerned that the Road should be out of the hands of the Receiver.

No combination can be made with other connecting lines by him, because it is not known what will be the permanency of his stay. In the hands of the Company it can be
262 improved, its business relations with other roads and cities established, and it would do injustice to all the Bondholders to prevent this on the very uncertain allegations and flimsy statements of the Petitioner.

The sale will be confirmed.

THE UNITED STATES OF AMERICA,

DISTRICT OF SOUTH CAROLINA,

263

IN THE CIRCUIT COURT—IN EQUITY.

Calvin Claflin, and Others, Complainants,

AGAINST

The South Carolina Railroad Co. and Others, Defendants.

264

ORDER CONFIRMING REPORT OF SALE FILED BY JOHN H. FISHER, SPECIAL MASTER.

The Report of John H. Fisher, the Special Master, to whom it was heretofore referred by a Decree of this Court, passed in this cause and filed on 25th September, 1880, and by an Order of the Supreme Court of the United States in

the appeal of George W. Williams et al. against Calvin Claflin et al., filed on 20th May, 1881, to sell all the property and rights of property included in the Second Mortgage 265
made by The South Carolina Railroad Company, as the same are described in the Deed of Trust of October 1st, 1872, to wit:

The Railroad constructed and owned by the said South Carolina Railroad Company in the States of South Carolina and Georgia, with all the Railway Tracks, Sidings, Bridges and Viaducts thereto belonging, and all lands and rights of way thereto incident, not exceeding the space of thirty (30) 266
feet on each side from the centre of the main track; and all lands belonging to the said Company and used by it for Wood and Water Stations, Depots, Warehouses, Offices, Machine Shops, Car and Engine Houses, and all Locomotives, Tenders, Cars, Stationary Engines, Tools, Materials, Machinery, and all other personal property of the said South Carolina Railroad Company necessary to and employed in the working of the said Road, and all the rights, privileges and franchises to the said Company belonging; and includ ing the premises known as Railroad Accommodation Wharf 267
and Torre's Mill, subject to the lien of certain mortgages given for the purchase money thereof;

And Exceptions having been filed in the Office of the Clerk of this Court on the 26th day of September, 1881, by and on behalf of Wm. P. Clyde, T. M. Logan and Joseph Bryan, bondholders, by James Conner, Esq., their Solicitor, in which Exceptions Messrs. Lord & Inglesby, Solicitors for certain unsecured creditors united, and such Exceptions 268
having been withdrawn, and a Petition having been this day filed by Messrs. Lord & Inglesby, Solicitors for J. H. V. Cockcroft, a holder of Non-Mortgage Bonds, in behalf of said Cockcroft and all other creditors claiming in the same right, and Messrs. A. G. Magrath, Samuel Lord, Jr., B. H. Rutledge and John Wingate having appeared as Counsel for said Petitioner, and having moved for an Order in accord-

ance with the prayer of the Petition, and read in support thereof the *ex parte* affidavits of J. H. V. Cockcroft; and
269 Messrs. Mitchell & Smith, Solicitors for Complainants, having given due notice of motion to confirm said sale, and Julian Mitchell appearing as Counsel for Complainants, and Thos. G. Shearman appearing as Counsel for the purchasers at the said sale, and both of said Counsel objecting to the reading of said Petition upon the ground that it was not verified, and to the reading of the said affidavit on the ground that it was not verified before any officer within the venue thereof, and the Counsel for said purchasers separately objecting
270 to the said Petition on the ground that such purchasers had never been served with notice thereof, and the Court having, by consent of Counsel for purchasers, overruled the last objection on condition that the pending motions should be heard on affidavits, and having also, after hearing Counsel, overruled the objections to the Petition and affidavit, and decided to hear the case upon the merits;

And the Counsel for the said Petition reading and filing in support thereof the affidavits of J. H. V. Cockcroft and
271 John D. Alexander, and the affidavit of Geo. Parsons, John D. Alexander, John S. Barnes and Wm. S. Hastie, Jr., and two affidavits of Wm. H. Brawley being read and filed in opposition to said Petition and in support of the motion for confirmation:

It is now, after hearing Julian Mitchell of Counsel for Complainants, and Thos. G. Shearman of Counsel for purchasers, in support of the motion for confirmation of the
272 Report of sale, and in opposition to said Petition, and A. G. Magrath, Samuel Lord, Jr., B. H. Rutledge and John Wingate, Esquires, in support of said Petition and in opposition to said motion—

Ordered, Adjudged and Decreed, That the said Report do stand confirmed, and that John S. Barnes, Samuel Sloan, James J. Higginson, Francis A. Stout and William H. Braw-

ley, as Trustees for themselves and associates, be allowed as purchasers of said property at the price reported by the said Special Master as the highest bidder therefor; and that the said Special Master do execute a Deed of the premises aforesaid to them upon receiving payment of the amount aforesaid, in manner and form following, that is to say: Fifty thousand ($50,000) dollars in cash, in addition to the one hundred thousand ($100,000) dollars in cash already received; such sum of one hundred and fifty thousand ($150,000) dollars to be reserved, pursuant to the Order of the Supreme Court of the United States in this cause, to satisfy and discharge any balance that may remain of the debt due to the Defendants, George W. Williams, Francis J. Pelzer, James S. Gibbes, Louis D. DeSaussure, and the executors of Henry Gourdin, after the proportionate share they receive under the Decree filed in this cause, upon the bonds and coupons they hold as collateral shall have been applied thereon; and the remainder, either in cash, or at the election of the purchasers, in the Second Mortgage Bonds and Coupons of the South Carolina Railroad Company, rating each bond at the value which its proportion of the whole purchase money would be if the same were distributed *pro rata* among the whole number of said bonds, except that bonds and coupons pledged as collateral security shall only be received as part of the purchase money in lieu of cash to an amount which shall not exceed the amount due on the obligations for which such bonds and coupons are pledged.

And it is further Ordered, That the said Special Master be, and he is hereby authorized and directed to deposit the cash and securities of every description received by him as part of the purchase money aforesaid, in some solvent, reputable Trust Company, duly incorporated by the laws of the State of South Carolina or the State of New York, and situated either in the City of Charleston or the City of New York; and that he do attend at either of the said cities upon due request of the said purchasers, to receive payment, either in cash or in securities, as aforesaid; and that he

by himself or by his agent duly authorized for that purpose, shall write, print or stamp upon all the Second Mortgage
277 Bonds and Coupons delivered to him in part payment of the said purchase money, the amount for which such bonds and coupons are respectively credited against such purchase money; and that, after holding the said securities for a reasonable time to complete such printing or stamping, he do return the same, duly impressed with such print or stamp, to the said purchasers, except in the case of bonds and coupons, the whole amount of which, or (in case they have been pledged as collateral security) the amount necessary to re
278 deem which, is fully paid by the amount allowed upon them for the purposes aforesaid, which last bonds and coupons the said Master shall cancel and file with the Clerk of this Court.

HUGH L. BOND,

October 7th, 1881. *Circuit Judge.*

Filed 7th October, 1881.

J. E. HAGOOD,

279 *C. C. C. U. S. Dist. S. C.*

280

PETITION.

281

IN THE CIRCUIT COURT OF THE UNITED STATES.

Ex Parte J. H. V. Cockcroft.

In Re Calvin Claflin, et al., Complainants,

VS. 282

The South Carolina Railroad Company, et al., Defendants.

And now comes J. H. V. Cockcroft, Petitioner in the above entitled cause, after a final decree entered in the matter of his Petition, and shows to the Court that the matter in dispute exceeds the sum of five thousand dollars: and thereupon the said J. H. V. Cockcroft appeals from 283 the said final decree to the Supreme Court of the United States, to be holden at Washington, at the next term thereof, and the same is accordingly allowed, and the Appellant is ordered to serve the usual citation according to law.

ORDER.

This Petition is refused on the ground that the Petitioner is no party to the suit, and does not ask to be made, and 284 nowhere states that he has proved any bond or claim against the Defendant Company.

HUGH L. BOND.

7th October, 1881.

Filed 7th October, 1881.

J. E. HAGOOD,
C. C. C. U. S. Dist. S. C.

UNITED STATES CIRCUIT COURT, } *Fourth Circuit.*
DISTRICT OF SOUTH CAROLINA. }

285

I, J. E. Hagood. Jr., Deputy Clerk of said Court, do hereby certify that the foregoing forty-six pages of printed matter and fifty-four pages of written matter, contain true copies of the decree for sale and all proceedings had thereon, including the report of sales, exceptions, withdrawal of exceptions, Petition of J. H. V. Cockcroft, affidavits in support of and against said Petition, opinion of the Court and order confirming sale, etc., Petition of Cockcroft for an Appeal and order thereon, in the case of Calvin Claflin, et al., Com-
286 plainants, *vs.* The South Carolina Railroad Company, et al., Defendants, are true copies of the original now on file in this office.

Given under my hand and seal of said Court, in the City of Charleston, this the fifteenth day of November A. D., 1881.

J. E. HAGOOD, JR., [L. S.]
Deputy C. C. C. U. S. Dist. S. C.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

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J. E. HAGOOD, JR., [L. S.]
Deputy C. C. C. U. S. Dist. S. C.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1006.

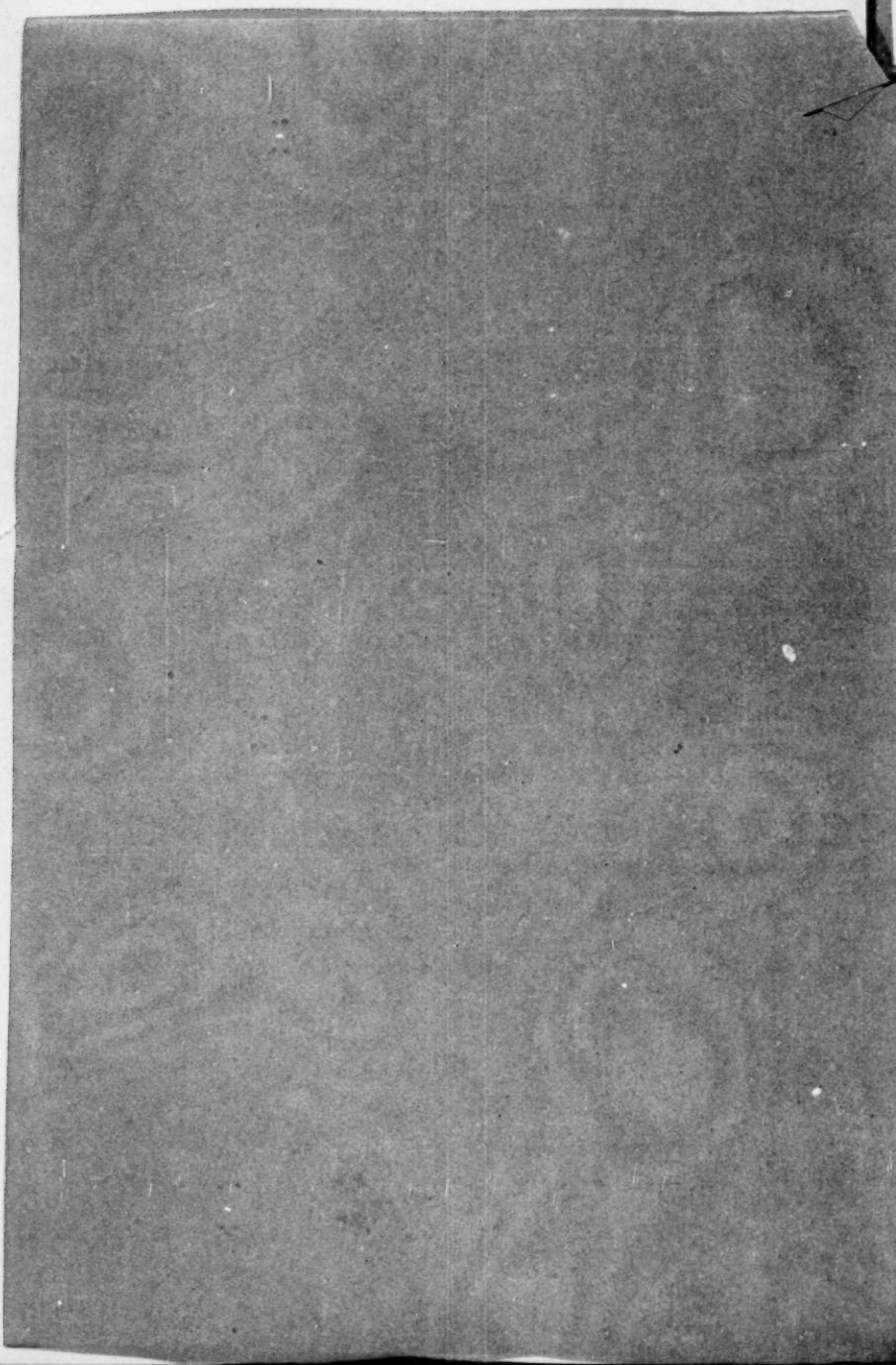
THE COUNTY OF CLAY, PLAINTIFF IN ERROR,

vs.

THE SOCIETY FOR SAVINGS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 10, 1881.



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County of Clay, a municipal corporation organized under and by virtue of the laws of the State of Illinois, defendant, of a plea of trespass on the case on promises.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 4th day of December, in the year of our Lord one thousand eight hundred and eighty, came the plaintiff, by its attorneys, and filed in the office of the clerk of said court its bond for costs in said cause, which said bond is in the words and figures following, to wit:

Bond for costs.

Circuit court United States of America, southern district of Illinois, ss.
January term, A. D. 1881.

SOCIETY FOR SAVINGS
vs.
COUNTY OF CLAY. } In assumpsit.

We do hereby enter ourselves security for costs in this cause,
3 and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this fourth day of Decem., 1880.

HAY, GREENE & LITTLER.

(Indorsed:) Filed December 4, A. D. 1880. J. A. Jones, clerk.

And afterwards, to wit, on said 4th day of December, in the year last aforesaid, there was issued out of said clerk's office a summons in said cause directed to the marshal of said district to execute, which said summons, together with the return of said marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, southern district of Illinois, ss.

The United States of America to the marshal of the southern district of Illinois, greeting:

We command you to summon County of Clay, if found in your
4 district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois, on the first day of the next term thereof, to be held at Springfield, in the district aforesaid, on the first Monday of January next, to answer unto Society for Savings of a plea of trespass on the case upon promises to its damage, as it alleges, of two thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this fourth day of December, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fifth year.

[L. S.] J. A. JONES, *Clerk.*

Marshal's return.

I hereby appoint F. B. Hitchcock my special deputy to serve the within writ.

JACOB WHEELER,
U. S. Marshal.

Executed this writ by reading the same and by delivering a true copy thereof to Richard J. Burns, county clerk of Clay County, this the seventh day of December, 1880.

JACOB WHEELER,
U. S. Marshal,
By F. B. HITCHCOCK,
Special Deputy.

5 (Indorsed:) Filed December 13, A. D. 1880. J. A. Jones, clerk.

And afterwards, to wit, on the 24th day of December, in the year last aforesaid, came the plaintiff, by its attorneys, and filed in said clerk's office its declaration in said cause; which said declaration is in the words and figures following, to wit:

Declaration.

In the circuit court of the United States, southern district of Illinois.
January term, A. D. 1881.

SOCIETY FOR SAVINGS }
vs.
COUNTY OF CLAY. }

The Society for Savings, a foreign corporation organized and existing under and by virtue of the laws of the State of Ohio, a resident and citizen of said State, plaintiff, by Hay, Greene & Littler, its attorneys, complains of The County of Clay, a municipal corporation organized and existing under and by virtue of the laws of the State of
6 Illinois, a resident and citizen of said State and of the district aforesaid, defendant of a plea of trespass on the case on promises.

For that whereas the defendant heretofore, to wit, on the 1st day of November, A. D. 1869, at, to wit, the district aforesaid, made and issued its certain series of bonds, partly printed and partly written, and commonly called railway aid bonds, and then and there delivered the same to the Illinois Southeastern Railway Company; which said bonds are exact copies of each other, and bond number No. 24 of said issue is in the words and figures following, to wit:

No. 24.] UNITED STATES OF AMERICA. [$1,000.

STATE OF [Vignette] ILLINOIS.

Clay County railroad bond.

[Vignette.] Registered by auditor of public accounts of the State of Illinois. Principal and interest collected and paid by the treasurer of State of Illinois.

Know all men by these presents that the county of Clay, State of

Illinois, acknowledges itself to owe and be indebted to the Illinois Southeastern Railway Company, or bearer, in the sum of one thousand dollars, which sum the said county of Clay promises to pay at
7 the American Exchange National Bank, in the city of New York, on the 1st day of January, A. D. 1890; the said county reserving the right to pay this bond at any time after five years from the date of its issue, with interest at the rate of seven per centum, per annum, payable semi-annually, on the first days of July and January of each year, on the presentation and surrender of the annexed coupons. This bond being issued under and pursuant to orders of the board of supervisors of Clay County, Illinois, for subscription to the capital stock of the Illinois Southeastern Railway Company, as authorized by virtue of the laws of the State of Illinois.

And the faith of the county of Clay is hereby irrevocably pledged for the payment of said principal and interest, as aforesaid.

In testimony whereof the said county of Clay has executed this bond by causing the chairman of the board of supervisors to subscribe his name hereto, and to be countersigned by the clerk of this county, and affixing the seal of said court.

All of which is done at Louisville, Illinois, by and under the order of the board of supervisors of Clay County, this 1st day of Nov., A. D. 1869.

8 WM. B. WILSON,
Chairman of Board of Supervisors.

Countersigned by—
[SEAL.] C. D. KENDALL,
Clerk of County Court.

STATE OF ILLINOIS, AUDITOR'S OFFICE,
Nov. 10, 1869, *Springfield.*

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provision of an act entitled "An act to amend an act entitled 'An act to incorporate the Illinois Southeastern Railway Company'" approved Feb. 24,1869, as well as the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT,
Auditor P. A.

And plaintiff avers that each of said bonds were duly regis-
9 tered in the office of the State auditor of Illinois, and the certificate of registration was duly endorsed on each of said bonds.

And the plaintiff further avers that said bonds were issued by the defendant in pursuance of an election duly called and held in said county under a law of said State authorizing the holding thereof, which said law was in force at the time of the calling and holding of said election, at which said election plaintiff avers that a majority of the legal voters of said county participating in the same voted in favor of issuing the said bonds to said railroad company.

And plaintiff further avers that after the issue and delivery of the said bonds as aforesaid, to wit, on the 1st day of January, A. D. 1870, plaintiff became the owner and holder of two coupons, taken from a

like number of said bonds; said coupons being numbered twenty-one and taken from bonds numbered twenty-four and twenty-five, due July 1, 1880, being exact copies of each other, and are for the sum of thirty-five dollars each; and one of said coupons, taken from bond number twenty-four, is in the words and figures following, to wit:

1880.] [$35.

The county of Clay, State of Illinois, will pay the bearer
10 hereof thirty-five dollars, on the 1st day of July, A. D. 1880, at American Exchange National Bank, in New York, being interest due on railroad bond No. 24.

C. D. KENDALL,
County Clerk.

(On face in large figures:) 21.

By means whereof, and by force of the statute in such case made and provided, said defendant became liable to pay plaintiff said sum of money in said coupons mentioned, to wit, the sum of seventy dollars, and being so liable, in consideration thereof, the defendant afterwards, to wit, on the day and year last aforesaid, at, to wit, the district last aforesaid, undertook and then and there promised to pay the plaintiff said several sums of money in said coupons mentioned, according to the tenor and effect thereof, when it, the defendant, should be thereunto afterwards requested.

And whereas, also, the defendants afterwards, to wit, on the 19th day of March, A. D. 1870, at, to wit, the district aforesaid, executed and issued its certain other series of bonds, partly written and partly printed, and commonly called railway aid bonds, and then and there delivered the same to the Illinois Southeastern Railway Company; which said bonds are exact copies of each other, and bond num-
11 ber forty-eight of said issue is in the words and figures following, to wit:

No. 48.] UNITED STATES OF AMERICA. [$1,000

STATE OF ILLINOIS.

Clay County railroad bonds.

Registered by auditor of public accounts of the State of Illinois. Principal and interest collected and paid by the treasurer of State of Illinois.

Know all men by these presents that the county of Clay, State of Illinois, acknowledges itself to owe and be indebted to the Illinois Southeastern Railway Company, or bearer, in the sum of one thousand dollars, which sum the said county of Clay promises to pay at the American Exchange National Bank, in the city of New York, on the 1st day of January, A. D. 1890, the said county reserving the right to pay this bond at any time after five years from the date of its issue, with interest at the rate of seven per centum per annum, payable semi-annually, on the first days of July and January of each year, on the presentation and surrender of the annexed coupons. This bond being issued under and pursuant to orders of the board of supervisors of Clay County, Illinois, for subscription to the capital stock of the Illinois Southeastern Railway Company, as authorized by virtue of the

12 laws of the State of Illinois. And the faith of the county of Clay is hereby irrevocably pledged for the payment of said principal and interest, as aforesaid.

In testimony whereof the said county of Clay has executed this bond by causing the chairman of the board of supervisors to subscribe his name hereto, and to be countersigned by the clerk of this county, and affixing the seal of said court; all of which is done at Louisville, Illinois, by and under the order of the board of supervisors of Clay County, this 18th day of March, A. D. 1870.

WM. B. WILSON,
Chairman of Board of Supervisors.

Countersigned by—
[SEAL.] C. D. KENDALL,
Clerk of County Court.

STATE OF ILLINOIS, AUDITOR'S OFFICE,
March 22, 1870, *Springfield.*

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been duly registered in this office this day, pursuant to the provisions of an act entitled "An act to amend an act entitled 'An act to incorporate the Illinois Southeastern Railway Company,'" approved Feb'y 24, 1869, as well as the provisions of an act entitled "An act to fund and provide
13 for paying the railroad debts of counties, townships, cities, and towns," in force April 16th, 1869.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT,
Auditor P. A.

And plaintiff avers that each of said bonds were duly registered in the office of the State auditor of Illinois, and the certificate of registration was duly endorsed on each of said bonds. And plaintiff further avers that said defendant issued said bonds in pursuance of an election duly called and held in said county, according to and under a law of said State authorizing the same, in force at that time, at which election a majority of the legal and qualified voters of said county participating in the same voted in favor of issuing said bonds to said railroad company.

And plaintiff further avers that after the issue and delivery of the said bonds as aforesaid, to wit, on the 1st day of June, A. D. 1870, plaintiff became the owner and holder of seven coupons, taken
14 from a like number of said bonds, said coupons being known as coupons number twenty-one, and taken from bonds numbered 26, 27, 29, 31, 33, 48, and 50, said coupons being exact copies of each other, and for the sum of thirty-five dollars each, due July 1, 1880; and one of said coupons, taken from bond number twenty-six, is in the words and figures following, to wit:

1880.] [$35.

The county of Clay, State of Illinois, will pay the bearer hereof thirty-five dollars, on the 1st day of July, A. D. 1880, at American Exchange National Bank, in New York, being interest due on railroad bond No. 26.

C. D. KENDALL,
County Clerk.

(Written in large figures on the face:) 21.

By means whereof, and by force of the statute in such case made and provided, said defendant became liable to pay plaintiff said sum of money in said coupons mentioned, to wit, the sum in the aggregate of $245.00, and being so liable, in consideration thereof, the defendant afterwards to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, undertook and then and there promised to pay the plaintiff said several sums of money in said coupons mentioned, according to the tenor and effect thereof, when the said defendant
15 should be thereunto afterwards requested.

And whereas, also, the defendant afterwards, to wit, on the 28th day of May, A. D. 1870, at, to wit, the district aforesaid, executed and issued its certain other series of bonds, partly written and partly printed, commonly called railway aid bonds, and then and there delivered the same to the Illinois Southeastern Railway Company, which said bonds are exact copies of each other, and wherein said defendant promised to pay said Illinois Southeastern Railway Company, or bearer, the sum of $1,000 in each and every bond, at the American Exchange National Bank, in the city of New York, on the 1st day of January, A. D. 1890, with interest at the rate of seven per cent. per annum, payable semi-annually, payable on July 1st and January 1st of each year, on the presentation and surrender of the coupons annexed to said bonds, said county reserving the right to pay said bonds at any time after five years from their issue. Said bonds being issued pursuant to orders of the board of supervisors of Clay County, Illinois, as subscription to the capital stock of the Illinois Southeastern Railway Company,
16 by virtue of the laws of the State of Illinois. Said bond being signed by Wm. R. Wilson, chairman of the board of supervisors, and the county clerk, C. D. Kendall, of said county, and the seal of said court affixed thereto, the same being done at Louisville, Illinois, under the order of the board of supervisors of Clay County on the 28th day of May, A. D. 1870. And plaintiff further avers that said defendant issued said bonds in pursuance of an election duly called and held in said county according to and under a law of said State authorizing the same, in force at that time, at which election a majority of the qualified and legal voters of said county participating in the same voted in favor of issuing said bonds to said railroad company.

Plaintiff further avers that after the issue and delivery of the said bonds as aforesaid, to wit, on the 1st day of June, A. D. 1870, it became the owner and holder of fourteen coupons taken from bonds numbered 52, 53, 54, 55, 57, 58, 59, 60, 64, 65, 67, 68, 70, and 72, said coupons being exact copies of each other and known as coupons numbered twenty-one, being for the sum of thirty-five dollars each, due July 1st, 1880; and one of said coupons, taken from bond numbered 52, is in the
17 words and figures following, to wit:

1880.] [$35.

The county of Clay, State of Illinois, will pay the bearer hereof thirty-five dollars, on the 1st day of July, A. D. 1880, at American Exchange National Bank, in New York, being interest due on railroad bond No. 52.

C. D. KENDALL,
County Clerk.

By means whereof, and by force of the statute in such case made and provided, said defendant became liable to pay plaintiff said sum of money in said coupons mentioned, to wit, the sum of $490.00, and

being so liable, in consideration thereof, said defendant afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, undertook and then and there promised to pay the plaintiff said several sums of money in said coupons mentioned, according to the tenor and effect thereof, when said defendant should be thereunto afterwards requested.

And whereas, also, the defendant afterwards, to wit, on the 28th day of May, A. D. 1870, at, to wit, the district aforesaid, executed and issued its two other certain bonds commonly called railway aid
18 bonds, and then and there delivered the same to the Illinois Southeastern Railway Company, which said bonds are exact copies of each other, and wherein said defendant promised to pay the said Illinois Southeastern Railway Company, or bearer, the sum of $100.00 in each and every bond at the American Exchange National Bank, in the city of New York, on the 1st day of January, A. D. 1890, with interest at the rate of seven per cent. per annum, payable semi-annually, payable on July 1st and January 1st of each year, on the presentation and surrender of the coupons annexed to said bonds, said county reserving the right to pay said bonds at any time after five years from their issue. Said bonds being issued pursuant to orders of the board of supervisors of Clay County, Illinois, as subscription to the capital stock of the Illinois Southeastern Railway Company, by virtue of the laws of the State of Illinois. Said bond being signed by Wm. R. Wilson, chairman of the board of supervisors, and C. D. Kendall, county clerk of said county, and the seal of said court affixed thereto, the same being done at Louisville, Illinois, under the order of the board of supervisors of Clay County, on the 28th day of May, A. D. 1870.

19 And plaintiff avers that each of said bonds were duly registered in the office of the State auditor of Illinois, and the certificate of registration was duly signed on each of said bonds by said auditor of State.

And plaintiff further avers that said defendant issued said bonds in pursuance of an election duly called and held in said county according to and under a law of said State authorizing the same, in force at that time, at which election a majority of the qualified and legal voters of said county participating in the same voted in favor of issuing said bonds to said railroad company.

Plaintiff further avers that after the issue and delivery of the said bonds as aforesaid, to wit, on the 1st day of June, A. D. 1870, it became the owner and holder of two coupons taken from bonds numbered 82 and 103, said coupons being exact copies of each other, and known as coupons number twenty-one, being for the sum of 3.50 dollars each, due July 1, 1880; and one of said coupons, taken from bond number 82, is in the words and figures following, to wit:

1880.] [$3.50.

20 The county of Clay, State of Illinois, will pay the bearer hereof three dollars and fifty cents, on the 1st day of July, A. D. 1880, at American Exchange National Bank, in New York, being interest due on railroad bond No. 82.

C. D. KENDALL,
County Clerk.

By means whereof, and by force of the statute in such case made and provided, said defendant became liable to pay plaintiff said sum of

money in said coupon mentioned, to wit, the sum of $7.00, and being so liable, in consideration thereof, said defendant afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, undertook and then and there promised to pay the said plaintiff said sums of money in said coupons mentioned, according to the tenor and effect thereof, when said defendant should be thereunto afterwards requested.

And whereas, also, the defendant afterwards, to wit, on the 4th day of January, 1871, at, to wit, the district aforesaid, made and issued its two other certain bonds, partly printed and partly written, and commonly called railway aid bonds, and then and there delivered the same
21 to the Illinois Southeastern Railway Company, which said bonds are for the sum of $1,000, each due and payable on the 1st day of January, A. D. 1890, the county reserving the right to pay the said bonds at any time after ten years from the date of issue of same, with interest at the rate of seven per cent. per annum, payable semi-annually, on the first days of July and January of each year, said interest being evidenced by coupons annexed to said bonds, and said bonds are exact copies of each other, and bond number eight of said issue is in the words and figures following, to wit:

No. 8.] UNITED STATES OF AMERICA. [$1,000.

STATE OF [Vignette] ILLINOIS.

Clay County railroad bond.

[Vignette.] Registered by auditor of public accounts of the State of Illinois. Principal and interest collected and paid by the treasurer of the State of Illinois.

[SEAL.] Know all men by these presents that the county of Clay, State of Illinois, acknowledges itself to owe and be indebted to the Illinois Southeastern Railway Company, or bearer, in the sum of one thousand dollars, which sum the said county of Clay promises to pay at the American Exchange National Bank, in the city
22 of New York, on the 1st day of January, A. D. 1890, the said county reserving the right to pay this bond at any time after ten years from the date of its issue, with interest at the rate of seven per centum per annum, payable semi-annually, on the first days of July and January of each year, on the presentation and surrender of the annexed coupons. This bond is one of a series of bonds issued by Clay County to aid in the construction of the Illinois Southeastern Railway, in pursuance of the authority conferred by an act of the general assembly of the State of Illinois entitled "An act to incorporate the Illinois Southeastern Railway Company," approved February 25th, 1867, and an act amendatory thereof, approved February 24th, 1869, and of an election of the legal voters of Clay County, Illinois, held on the 22d day of April, A. D. 1868, under the provisions of said act.

This bond is not to become a binding obligation on the said county of Clay until the following conditions shall have been complied with, to wit, this bond to become due and payable on the express condition that said company shall have completed the whole length of its line from Shawneetown, on the Ohio River, to the Chicago Branch of the
23 Illinois Central Railroad, and shall have the cars running thereon.

And for the payment of the said sum of money and the interest accruing thereon in the manner aforesaid, upon the performance of

said condition, the faith of the said county of Clay is hereby irrevocably pledged.

In testimony whereof the said county of Clay has executed this bond by causing the chairman of its board of supervisors to subscribe his name hereunto, & to be countersigned by the clerk of this court, and affixing the seal of said court; all of which is done by and under orders of the board of supervisors of Clay County, at Louisville, this the 4th day of Jan'y, A. D. 1871.

WM. B. WILSON,
Chairman of Board of Supervisors.

Countersigned by—
C. D. KENDALL,
Clerk of the County Court.

STATE OF ILLINOIS, AUDITOR'S OFFICE,
January 9, 1871, *Springfield.*

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled
24 "An act to amend an act entitled 'An act to incorporate the Illinois Southeastern Railway Company,'" approved February 24th, 1869, as well as the provisions of act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, towns," in force April 16, 1869.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT,
Auditor P. A.

STATE OF ILLINOIS,
Clay County, ss:

I, Jno. L. Moore, clerk of the county court of Clay County, in the State of Illinois, do hereby certify that the county court of said county have entered an order on the records of said county court, directing me to endorse upon this bond the following words, to wit: All the conditions upon which this bond was to become a binding obligation of the county of Clay have been complied with.

In testimony whereof I hereunto affix my hand and the seal of
25 said court, at Louisville, this 4th day of January, A. D. 1871.

[SEAL.] JNO. L. MOORE, *Clerk.*

And plaintiff avers that the recitals in said bond as to the election therein mentioned held under the provisions of the act therein mentioned are true.

And plaintiff avers that after the issue and delivery of said bonds and coupons, and before the maturity of coupons number twenty-one, to wit, on the 1st day of January, 1875, at, to wit, the district aforesaid, plaintiff for value paid became the owner and holder of two coupons known as coupons number twenty-one, taken from a like number of bonds, to wit, bonds number 8 and 9, which said coupons are exact copies of each other, and one of said coupons number twenty-one, taken from bond number eight, is in the words and figures following, to wit:

1880.] [$35.

The county of Clay, State of Illinois, will pay the bearer hereof thirty-five dollars, on the 1st day of July, A. D. 1880, at American Exchange National Bank, in New York, being interest due on railroad bond No. 8.

C. D. KENDALL,
County Clerk.

(Written on the face in large figures:) 21.

26 By reason whereof, and by force of the statute in such case made and provided, the defendant became liable to pay the plaintiff said sum of money in said coupons mentioned, to wit, the sum of seventy dollars, and being so liable, in consideration thereof, the defendant afterwards, to wit, on the day and year last aforesaid, at, to wit, the district last aforesaid, undertook and then and there promised to pay plaintiff the said sums of money in the said coupons mentioned, according to the tenor and effect thereof, when the said defendant should be thereunto afterwards requested.

And whereas the defendant afterwards, to wit, on the 1st day of September, A. D. 1880, at, to wit, the district aforesaid, became indebted to the plaintiff in a certain other large sum of money, to wit, the sum of two thousand dollars, for money lent and advanced by the plaintiff to the defendant at its request; and in the like sum for money before that time paid and expended by the plaintiff for the use of the defendant at its request; and in the like sum for money before that time received by the defendant for the use of the plaintiff; and in the like sum for interest on divers sums of money before that time foreborne by the plaintiff to the defendant at its request for divers spaces
27 of time before then elapsed, and being so indebted, the defendant, in consideration thereof, then and there promised the plaintiff to pay it on request the several sums of money so due it as aforesaid.

Yet the defendant, though requested, has not paid the said sums of money, or any or either of them, or any part thereof, to the plaintiff, but refuses so to do to the damage of the plaintiff of $2,000, and therefore it bring its suit.

HAY, GREENE & LITTLER,
Att'ys for Plaintiff.

County of Clay to Society for Savings, Dr.

For money paid, laid out, & expended	2,000
" " lent and advanced	2,000
" " had and received	2,000
" interest for'borne	2,000

(Indorsed:) Filed December 24, 1880. J. A. Jones, clerk.

And afterwards, to wit, on the 3d day of January, at the January term of said court, in the year of our Lord one thousand eight
28 hundred and eighty-one, the following proceedings were had in said court and entered of record in said cause, to wit:

Rule to plead.

SOCIETY FOR SAVINGS
v.
COUNTY OF CLAY. } Assumpsit.

On motion of plaintiff, by Messrs. Hay, Greene and Littler, its attorneys, the defendant having been regularly served with process is ruled to plead herein by Wednesday, the 5th day of January instant.

And afterwards, to wit, on the 5th day of January, in the year last aforesaid, came the defendant, by its attorneys, and filed its pleas in said cause; which said pleas are in the words and figures following, to wit:

Pleas.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court, January term, A. D. 1881.

COUNTY OF CLAY
ats.
SOCIETY FOR SAVINGS. } Assumpsit.

29 The defendant, The County of Clay, by W. J. Henry, its attorney, comes and defends, when, &c., and says that it did not undertake and promise in manner and form as the plaintiff has above thereof complained against it, and of this it puts itself upon the country.

W. J. HENRY,
Att'y for Def't.

And the said defendant, by W. J. Henry, its attorney, comes and defends, &c., and says that the said Society for Savings ought not to maintain there action thereof against said county, because it says that there is not, nor on the day of the commencement of this suit, nor ever since was there in existence any such corporation called the Society for Savings, as by the said written declaration is above supposed, and this it is ready to verify; wherefore it prays judgment if the said plaintiff ought to maintain its aforesaid action thereof against said county.

W. J. HENRY,
Att'y for Def't.

(Indorsed:) Filed Jan'y 5, 1881. J. A. Jones, clerk.

30 And afterwards, to wit, on the same day and in the year last aforesaid, came the defendant, by its attorneys, and filed its second plea in said cause; which said plea is in the words and figures following, to wit:

2d plea.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court, January term, A. D. 1881.

THE COUNTY OF CLAY *a't's* SOCIETY FOR SAVINGS. } Assumpsit.

The defendant, The County of Clay, by Hagle & Finch and Henry & Cook, its attorneys, comes and defends, when, &c., and says that said County of Clay did not undertake and promise in manner and form as the plaintiff hath above thereof complained against it, and this said county prays may be inquired of by the country.

HAGLE & FINCH AND
HENRY & COOK,
Att'ys for Def't.

STATE OF ILLINOIS,
Clay County, ss:

Alexander W. Bothwell makes oath and says that the above
31 plea by said county, by it above pleaded, is true in substance and in fact, as affiant verily believes.

ALEXANDER W. BOTHWELL.

Subscribed and sworn to before me this 15th day of January, A. D. 1881.

JAMES A. FINCH, *N. P.*

And the said County of Clay, defendant as aforesaid, for a further plea in this behalf, comes and defends, &c., and says that the said Society for Savings ought not to maintain its action thereof against said County of Clay, because it says that there is not, nor on the day of the commencement of this suit, nor ever since, was there in existence any such corporation called the Society for Savings, as by the said writ and declaration is above supposed, and this it is ready to verify; wherefore said county prays judgment if the said plaintiff ought to maintain 'is aforesaid action thereof against said county, &c.

HAGLE & FINCH AND
HENRY & COOK,
Att'ys for Def't.

(Indorsed:) Filed January 5, 1881. J. A. Jones, clerk.
(Also indorsed:) Refiled February 10, 1881. J. A. Jones, clerk.

32 And afterwards, to wit, on the 10th day of February, in the year last aforesaid, came the parties, by their attorneys, and filed in said clerk's office their stipulation in said cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

United States circuit court, January term, A. D. 1881.

SOCIETY FOR SAVINGS
vs.
COUNTY OF CLAY.

It is hereby stipulated and agreed that the plaintiff shall file a new count in this cause, declaring upon the bonds held by it, and serially numbered 8, 9, 24, 25, 26, 27, 29, 31, 33, 48, 50, 52, 53, 54, 55, 57, 58, 59, 60, 64, 65, 67, 68, 70, 72, 82, 103, aggregating $25,200, and for the purposes of this cause said bonds are hereby declared to be due and payable. This count being filed at the instance and request of defendant, no question shall be made as to the sufficiency of said count as to matters of form, and no questions shall be made as to the maturity of the bonds described above. It is further stipulated that in case the
33 issues are found for the plaintiff in this case judgment shall be rendered for the full amount of the principal of said bonds, with the accrued interest thereon to date of judgment, and also for the full amount of all past due and unpaid coupons taken from said bonds.

It is also stipulated and agreed that a jury shall be waived, and this cause shall be tried by the court.

D. T. LITTLER,
Att'y for Plaintiff.
W. J. HENRY,
For Def't.

(Indorsed:) Filed February 10, 1881. J. A. Jones, clerk.

And afterwards, to wit, on the day and year last aforesaid, came the plaintiff, by its attorneys, and filed in said clerk's office an additional count in said cause, which is in the words and figures following, to wit:

Additional count.

And whereas, also, the said defendant heretofore, to wit, on the first day of November, 1869, issued and delivered to the Illinois Southeastern Railway Company its, to wit, twenty-seven bonds, commonly called railway aid bonds, bearing date, to wit, the day and year
34 last aforesaid, serially numbered as follows, to wit, Nos. 8, 9, 24, 25, 26, 27, 29, 31, 33, 48, 50, 52, 53, 54, 55, 57, 58, 59, 60, 64, 65, 67, 68, 70, 72, 82, and 103, the two last mentioned of said bonds being for the sum of $100 each, and all the balance of said bonds are for the sum of $1,000 each, said bonds amounting in the aggregate, exclusive of interest, to the sum of $25,200, and each and every of said bonds, by the terms thereof, are due and payable five years after the date thereof. And the said railroad company, to whom the said bonds were issued and delivered as aforesaid, afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of Ohio, sold and delivered the said several bonds to the plaintiff for full value, of all of which the defendant had notice. By means whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay the said plaintiff said sum of money in the said bonds mentioned, to wit, the sum of $25,200, and, being so liable, in consideration thereof, after-

wards, to wit, on the day and year last aforesaid, at, to wit, the district , the said defendant promised to pay it, the said plaintiff, the said sum of money, according to the tenor and effect thereof, when
35 the defendant should be thereunto afterwards requested. Yet the defendant, though often requested by the said plaintiff to pay the said sum, hath refused, and still doth refuse, to pay the same or any part, to the damage of the said plaintiff of $40,000, and therefore it brings its suit.

D. T. LITTLER,
Att'y for Plaintiff.

(Indorsed:) Filed February 10, 1881. J. A. Jones, clerk.

And afterwards, to wit, on the same day and in the year last aforesaid, and at the January term of said court, the following further proceedings were had in said court, and entered of record in said cause, to wit:

Trial.

SOCIETY FOR SAVINGS
v.
COUNTY OF CLAY. } Assumpsit.

This day comes as well the plaintiff, by Messrs. Hay, Greene, and Littler, its attorneys, as the defendant, by W. J. Henry, esq., its attorney, and the defendant withdraws its plea of nul tiel corpora-
36 tion; whereupon the issue joined by consent is tried by the court, a jury being waived, and the court having heard the evidence and argument of counsel, takes the same under advisement.

And afterwards, to wit, on the 16th day of February, in the year last aforesaid, there was filed in said clerk's office the findings by the court in said cause, which is in the words and figures following, to wit:

Findings by the court.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court, January term, A. D. 1881.

SOCIETY FOR SAVINGS
vs.
THE COUNTY OF CLAY. } Findings of the court.

Be it remembered that on the trial of the above-entitled cause before Samuel H. Treat, sole judge, holding the circuit court within and for the southern district of Illinois aforesaid, said court, from the evidence in said cause, and the agreed state of facts, finds the fol-
37 lowing facts, upon which the judgment in said cause is rendered:

The court finds from the evidence that the Illinois Southeastern Railway Company was duly incorporated under an act entitled "An act to incorporate the Illinois Southeastern Railway Company," in force February 26th, 1867, which said act is referred to and asked to be taken and considered as a part of the findings in this case.

The court further finds from the evidence that on the second day of March, A. D. 1868, an order was made by the board of supervisors within and for the county of Clay that a special election shall be held at the usual places of voting in said county of Clay on the 22d day of April, A. D. 1868, upon the following proposition, to wit:

First. That the county of Clay subscribe one hundred thousand dollars to the capital stock of the Illinois Southeastern Railway Company.

Second. That in payment for such subscription to the capital stock of said company bonds of the said county of Clay be issued to said railway company; one-fourth of the amount to be in bonds of
38 the denomination of one hundred dollars each, and the other three-fourths of said bonds to be of the denomination of not less than five hundred nor more than one thousand dollars each; said bonds to bear interest at the rate of seven per cent. per annum from the date of their delivery to said railway company, payable half yearly, in the city of New York, on the first day of January and July of each year; said bonds to be so drawn that the county of Clay may pay them at any time after five years from the date of issuing the same, but the said county of Clay shall not be compelled to pay the principal of any of said bonds until after the expiration of twenty years, and that the faith of the county of Clay be pledged for the payment of the interest accruing upon said bonds, and for the ultimate payment of the principal; provided, always, that said bonds so issued shall be delivered to said railway company and become binding on the county of Clay only in the following manner, to wit: The board of supervisors of Clay County shall deliver one-fourth of the amount of said one hundred thousand dollars of bonds to the said railway company, when ten consecutive miles of the grade, bridging, and tieing of said railroad shall be ready for
39 the iron in said county of Clay, and not sooner; and when another ten miles of said railroad shall be completed as aforesaid in said Clay County the board of supervisors shall deliver to said railway company another one-fourth of the amount of the said one hundred thousand dollars of bonds, and not sooner; and when the grading, bridging, and tieing of said railroad shall be completed as aforesaid from the southern boundary line of Clay County to its junction with the Chicago Branch of the Illinois Central Railroad the said board of supervisors of Clay County shall deliver to said railroad company the remaining fifty thousand dollars of bonds as aforesaid, and not sooner; and that the line of said railroad shall be located and run within the corporate limits of the town of Louisville, in said county, and shall cross the present road-bed of the Ohio & Mississippi Railroad at some point not further east than the center of the northeast quarter of section twenty-five, town. three north of range six east, nor further west than the center of the southeast quarter of section twenty-six, town. and range as aforesaid, and that a tax be levied and collected
49 for the payment of the principal and interest of said bonds; that all of the aforesaid propositions as to subscriptions and locations be voted upon as one question; and voters of said Clay County who favor the adoption of said propositions shall have written or printed on their ballots "For subscription," and those opposed "Against subscription."

That it was further ordered by the board of supervisors aforesaid that at the special election aforesaid, to be held at the usual place of voting in said county on the 22nd day of April, 1868, the following additional proposition to be voted upon as an inducement or bonus towards the building of the Illinois Southeastern Railway: "That the

county of Clay donate fifty thousand dollars to said railway company, subject to the same conditions as to location as hereinbefore provided; that in payment of such donation bonds of the said county of Clay be issued, made payable to the directors of said railway company, said bonds to be of any denomination not less than one hundred nor more than one thousand dollars each; such bonds to bear interest from the completion of such railway in running order through the said county of Clay at the rate of seven per cent. per annum, payable half-
41 yearly, in the city of New York, on the first days of January and July of each year; said bonds to be so drawn as to give the said county of Clay the right to pay them or any part thereof after ten years from the date of issuing the same, but reserving to the said county of Clay the right of not being compelled until the expiration of twenty years after date to pay the same; and that said county shall not be liable to pay said bonds or any part of them or any interest upon them until said railway shall be completed the whole length of the line from Shawneetown, on the Ohio River, to the Chicago Branch of the Illinois Central Railroad, and cars running thereon; and each of said bonds so donated shall declare upon its face the conditions upon which it is to become due and payable; that the faith of said county of Clay be pledged for the payment of the interest accruing upon said bonds, according to the conditions of the same, and that the principal and interest shall be raised by taxation; that all of the said propositions for donation to the Illinois Southeastern Railway Company shall be voted upon as one question, and all the voters of said county who favor the adoption of said propositions shall have written or
42 printed upon their ballots "For donation," and those opposed shall have written or printed upon their ballots "Against donation," which election to be held in accordance with the laws governing general elections in this State, the polls to be opened at 8 o'clock in the morning and continue open until 6 o'clock in the afternoon of said day.

The court further finds from the evidence that an election was held at the usual place of holding elections on the 22nd day of April, A. D. 1868, in accordance with the order of the board of supervisors aforesaid, and resulted in a majority of the votes being cast in said county in favor of said propositions.

The court further finds from the evidence that at a special meeting of the board of supervisors of said county held on the first Monday of November, 1868, that the president of said board of supervisors was instructed, by resolution duly passed by said board of supervisors, to make such donation, and to subscribe said amount upon the books of said railway company, said subscription and donation to be made
43 strictly and only in accordance with the terms of the proposition aforesaid, submitted and voted upon on the 22nd day of April, 1868.

The court further finds from the evidence that said railway company located said road and graded, bridged, and tied ten miles thereof before the first day of November, 1869, and that on that day the president of said board of supervisors made the subscription upon the books of the Illinois Southeastern Railway Campany, under and in pursuance of the submission, vote, and resolution aforesaid, said subscription being then made upon the terms and conditions aforesaid.

The court further finds from the evidence that the one hundred thousand dollars of bonds so voted as subscription as aforesaid was delivered

to said railway company on the 1st day of November, 1869, and subsequent thereto, said railway company having complied with the terms and conditions of said vote before receiving said bonds.

The court further finds from the evidence that on, to wit, the first day of January, 1871, the fifty thousand dollars so donated as aforesaid under and in pursuance of the vote aforesaid, in the bonds of said county, were delivered and donated to said railway company, said railway company having complied with the conditions of said vote and having completed its line of railway from Shawneetown to the Chicago Branch of the Illinois Central Railroad, and having at the time cars running thereon.

The court further finds from the evidence that said bonds were registered in the office of the auditor of public accounts, and that taxes have been certified by said auditor, levied, and collected, and the interest paid on said bonds up to the time of the commencement of this suit.

The court further finds from the evidence that on the 24th day of February, A. D. 1869, the legislature of the State of Illinois passed an act amending the charter of the Illinois Southeastern Railway Company, which amendatory act was duly accepted by said railway company, and became a part of the charter of the said Illinois Southeastern Railway Company, and said amendatory act is by agreement to be taken and considered by the court.

The court further finds from the evidence that said bonds for subscription are each in the words and figures following, to wit:

No. 24.] UNITED STATES OF AMERICA. [$1,000.

STATE OF [Vignette] ILLINOIS.

Clay County railroad bond.

Written across the face of bond in red ink: One thousand dollars.

[Vignette.] Registered by auditor of public accounts of the State of Illiniois. Principal and interest collected and paid by the treasurer of State of Illinois.

Know all men by these presents that the county of Clay, State of Illinois, acknowledges itself to owe and be indebted to the Illinois Southeastern Railway Company, or bearer, in the sum of one thousand dollars, which sum the said county of Clay promises to pay at the American Exchange National Bank, in the city of New York, on the 1st day of January, A. D. 1890, the said county reserving the right to pay this bond at any time after five years from the date of its issue, with interest at the rate of seven per centum per annum, payable semi-annually, on the first days of July and January of each year, on the presentation and surrender of the annexed coupons. This bond being issued under and pursuant to orders of the board of supervisors of Clay County, Illinois, for subscription to the capital stock of the Illinois Southeastern Railway Company, as authorized by virtue of the laws of the State of Illinois. And the faith of the county of Clay is hereby irrevocably pledged for the payment of said principal and interest as aforesaid.

In testimony whereof the said county of Clay has executed this bond by causing the chairman of the board of supervisors to subscribe his name hereto, and to be countersigned by the clerk of this county, and

affixing the seal of said court. All of which is done at Louisville, Illinois, by and under the order of the board of supervisors of Clay County, this the 1st day of Nov., A. D. 1869.

[SEAL.]

WM. B. WILSON,
Chairman of Board of Supervisors.

Countersigned by—
C. D. KENDALL,
Clerk of the County Court.

An act authorizing counties and cities in the State of Illinois to subscribe to the capital stock or make loans to railway companies:

(See Gross' Statutes of Illinois, pages 547 and 548.)

SECTION 77. Whenever the citizens of any city or county in this State are desirous that said city or county should subscribe for
47 stock in any railroad company already organized or incorporated, or hereafter to be organized or incorporated under any law of this State, such city or county may and are hereby authorized to purchase or subscribe for shares of the capital stock of any such company in any sum not exceeding one hundred thousand dollars for each of such cities or counties, and the stock so subscribed for or purchased shall be under the control of the county court of the county or city counsel making such subscription or purchase in all respects as stock owned by individuals.

SECTION 78. For the payment of said stock, the judge of the county court of the county, or the common council of the city making such subscription or purchase, are hereby authorized to borrow money, at a rate, not exceeding 10 per cent. per annum, and to pledge the faith of the county or city for the annual payment of the interest, and the ultimate redemption of the principal; or if the judge as aforesaid or the said common council shall deem it most advisable, they are hereby authorized to pay such subscription or purchase in bonds of the said city or county, making such subscription, to be drawn for that purpose, in
48 sums not less than $50, bearing interest, not exceeding 10 per centum per annum. Provided, That no bond shall be paid out at a date less than par value.

SECTION 79. The railroad companies already organized or incorporated, or hereafter to be organized or incorporated under the laws of this State, are hereby authorized to receive the bonds of any county or city becoming subscribers to the capital stock of such company at par, and in lieu of cash, and to issue their bonds, bearing interest not exceeding ten per cent. per annum, for any monies by them borrowed for the construction of their railroad and fixtures, and for the purchase of engines and cars, and for such purpose may dispose of any bonds by them received as aforesaid.

Extract from an act to amend an act entitled "An act to incorporate the Illinois Southeastern Railway Company," approved February 24th, A. D. 1869.

SECTION 12. That when payment of subscription to the capital stock of said company or payment for donation to said company have been or shall be made by villages, cities, counties, or townships, in bonds of such villages, cities, counties, or townships, under any act au-
49 thorizing such subscription or donation to be made, all such bonds issued or negotiated by the proper author, of such villages, cities,

counties, or townships, and appearing regular on the face thereof, shall, in the hands of said company, or any other bona-fide holder thereof, be deemed and taken in all courts, and elsewhere, as prima facie evidence of the regularity of everything required by the several acts in relation to the issuing of said bonds, or by any other act to be done preliminary to the issuing of and negotiation of said bonds.

STATE OF ILLINOIS, AUDITOR'S OFFICE,
Springfield, Nov. 10th, 1869.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to amend an act entitled 'An act to incorporate the Illinois Southeastern Railway Company.'" approved Feb. 24, 1869, as well as
50 the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT,
Auditor P. A.

Also that said donation bonds are in the words and figures, to wit:

No. 8.] UNITED STATES OF AMERICA. [$1,000.

STATE OF [vignette.] ILLINOIS.

Clay County railroad bond.

[Vignette.] Registered by auditor of public accounts of the State of Illinois. Principal and interest collected and paid by the treasurer of State of Illinois.

Know all men by these presents that the county of Clay, State of Illinois, acknowledges itself to owe and be indebted to the Illinois Southeastern Railway Company, or bearer, in the sum of one thousand dollars, which sum the said county of Clay promises to pay at the
51 American Exchange National Bank, in the city of New York, on the 1st day of January, A. D. 1890, the said county reserving the right to pay this bond at any time after ten years from the date of its issue, with interest at the rate of seven per centum per annum, payable semi-annually, on the first days of July and January of each year, on the presentation and surrender of the annexed coupons. This bond is one of a series of bonds issued by Clay County to aid in the construction of the Illinois Southeastern Railway, in pursuance of the authority conferred by an act of the general assembly of the State of Illinois entitled "An act to incorporate the Illinois Southeastern Railway Company," approved February 25th, 1867, and a n act amendatory thereof, approved February 24th, 1869, and of an election of the legal voters of Clay County, Illinois, held on the 22nd day of April, A. D. 1868, under the provisions of said act.

This bond is not to become a binding obligation on the said county of Clay until the following conditions shall have been complied with, to wit: This bond to become due and payable on the express conditions that said company shall have completed the whole
52 length of its line from Sawneetown, on the Ohio River, to the

Chicago Branch of the Illinois Central Railroad, and shall have the cars running thereon. And for the payment of the said sum of money, and the interest accruing thereon in the manner aforesaid, upon the performance of said conditions the faith of the said county of Clay, is hereby irrevocably pledged.

In testimony whereof the said county of Clay has executed this bond by causing the chairman of its board of supervisors to subscribe his name hereunto, & to be countersigned by the clerk of this court, and affixing the seal of said court.

All of which is done by and under orders of the board of supervisors of Clay County, at Louisville, this the 4th day of Jan'y, A. D. 1871.

[SEAL.] WM. B. WILSON,
Chairman of Board of Supervisors.

Countersigned by—
C. D. KENDALL,
Clerk of the County Court.

An act to incorporate the Illinois Southeastern Railway Company. (See private laws of the State of Illinois, session of 1867, vol. 2nd, pages 750 to 755 inclusive.)

53 SECTION 7. The county court or board of supervisors (where such county is under township organization) of any county into or through which this road or its branch may pass is hereby authorized and fully empowered to donate to said company as a bonus or inducement toward the building of said railroad or its branch any sum not exceeding one hundred thousand dollars, and may order the clerk of the county court or board of supervisors of such county to issue bonds of the county to the amount donated; and such clerk of the county court or board of supervisors, as the case may be, of such county shall countersign and deliver said bonds so issued to the president or directors of said company, which bonds may bear any rate of interest not exceeding ten per cent. per annum, payable at maturity of the bond, as hereinafter expressed, and yearly thereafter: Provided, That no donation by the county court or board of supervisors of any such county shall be of a greater sum than fifty thousand dollars, until after the question of such larger donation shall have been sub-
54 mitted to the legal voters of such county at an election to be called, conducted, returns made, canvassed, and published in the usual manner of calling, conducting, making returns, canvassing, and publishing special county elections, at which election each voter shall vote a ticket upon which is written or printed the words "For donation" or "Against donation;" and if the majority of the ballots cast at such an election be in favor of donation, it shall be the duty of the county court or board of supervisors of such county so voting to donate some amount, not less than fifty thousand dollars nor more than one hundred thousand dollars, to said company, and to order the issuing of bonds of the county, as hereinbefore provided, for the amount so donated; which bonds shall be made payable to the directors of said company, and may be in any denomination of not less than one hundred nor more than one thousand dollars each, at the discretion of the said county court so issuing the same: Provided, That the bonds of any county so donated and issued shall not mature nor become due or payable, nor any of the interest accruing thereon, or upon any
55 part thereof, until the said company shall have completed or cause

to be completed so much of the line of said road or its branch as may be within the county so donating, or when some certain specified section or part of the road shall have been finished, as may be agreed upon between this company and the county court or board of supervisors of the county making the donation; and each of said bonds shall declare upon its face the conditions upon which it is to become due.

Approved February 25th, 1867.

An act to amend an act entitled "An act to incorporate the Illinois Southeastern Railway Company."

SECTION 3. Be it further enacted, That the true intent and meaning of section seven of the original act, to which this is an amendment, is, and it is hereby so declared to be, that said bonds so to be issued shall not be delivered to said company, nor become binding obligations of the several counties issuing the same, nor shall interest be payable thereon, until the said company shall have completed so much of the line of the said road as may be within the county so donating, or
56 when some certain specified section or part of the road shall have been finished, as may be agreed upon between said company and the county court or board of supervisors, as the case may be, of the county making the donation, then, and in all such cases, an amount of such bonds may be issued proportioned to the length of such completed section or sections; and the county courts or board of supervisors of said counties, respectively, may make and issue such bonds, payable to the directors of said company, or bearer, or otherwise, so as to make them negotiable by delivery, having such time to run and bearing such a rate of interest not exceeding ten per cent. per annum, payable annually or semi-annually, in or out of the State, as may be agreed upon by them and said railway company, and conformable to the terms upon which said donations were or may be respectively voted for in said counties, the interest to be payable to bearer, according to interest coupons attached to said bonds.

SECTION 12. That when payment of subscription to the capital stock of said company, or payments for donations to said company,
57 have been or shall be made by villages, cities, counties, or townships, in bonds of such villages, cities, counties, or townships, under any act authorizing such subscription or donation to be made, all such bonds issued or negotiated by the proper authorities of such villages, cities, counties, or townships, and appearing regular on the face thereof, shall in the hands of said company, or any other bona fide holder thereof, be deemed and taken in all courts and elsewhere as prima facie evidence of the regularity of everything required by the several acts in relation to the issuing of said bonds, or by any other act to be done preliminary to the issuing and negotiation of said bonds.

SECTION 13. Whereas in section seven of the act to which this is an amendment it was provided that any bonds in payment of any donation made by counties to said railway company, that each of said bonds should declare upon its face the consideration upon which it should become due; and whereas the election notices heretofore inserted by the proper authorities of any such counties making donations to said railway company, as well as the act to which this act is
58 an amendment, contains certain conditions required to be fulfilled by said railway company before the bonds of such county should become due and payable, and which conditions were by such notices, as well as by the act to which this act is an amendment, required to be inserted on the face of such bonds to be issued by such

counties: Therefore, be it further enacted, That upon a full and complete performance by said company of all the conditions upon which said bonds were to become binding obligations of the counties issuing the same it shall be the duty of the county court or board of supervisors, where such county is under township organization, of the respective counties making such donations, to enter an order upon their records, at a regular or special term of the court, directing the clerk of such court to certify, over his official seal, upon the back of each of said bonds so issued, in language as follows, viz: All the conditions upon which this bond was to become a binding obligation of the county of have been complied with.

STATE OF ILLINOIS, AUDITOR'S OFFICE,
Jan'y 9, 1871, *Springfield.*

59 I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of 'An act entitled "An act to amend an act entitled 'An act to incorporate the Illinois Southeastern Railway Company,'" approved Feb. 24, 1869, as well as the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT,
Auditor P. A.

STATE OF ILLINOIS,
Clay County, ss:

I, Jno. L. Moore, clerk of the county court of Clay County, in the State of Illinois, do hereby certify that the county court of said county have entered an order on the records of said county court, directing me to endorse upon this bond the following words, to wit: All
60 the conditions upon which this bond was to become a binding obligation of the county of Clay have been complied with.

In testimony whereof I hereto affix my hand and the seal of said court, at Louisville, this 4th day of January, A. D. 1871.

[SEAL.] JNO. L. MOORE, *Clerk.*

And the court further finds that the plaintiff purchased the bonds in suit for full value, before maturity, and is an innocent holder thereof, without notice of any irregularity in the issue, except such constructive notice as the law charges it with.

Approved.

S. H. TREAT,
Dist. Judge.

(Indorsed:) Filed Feb'y 16, 1881. J. A. Jones, clerk.

And afterwards, to wit, on the said 16th day of February, at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-one, the following further proceedings were
61 had in said court and entered of record in said cause, to wit:

Judgment.

SOCIETY FOR SAVINGS
v.
COUNTY OF CLAY. } Assumpsit.

This day comes as well the plaintiff, by Messrs. Hay, Greene and Littler, its attorneys, as the defendant, by W. J. Henry, esq., its attorney, and the issue joined by consent is tried by the court, a jury being waived, and the court having heard the evidence and argument of counsel finds the issue for the plaintiff, and assesses its damages to the sum of twenty-seven thousand two hundred and twenty-four dollars and eighteen cents.

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the said sum of twenty-seven thousand two hundred and twenty-four dollars and eighteen cents, its damages aforesaid assessed, together with the sum of fifty-seven dollars and sixteen cents, its costs and charges by it about its suit in this behalf expended, and that execution issue therefor.

62 And afterwards, to wit, on Tuesday, the 8th day of March, at the January term of said court, in the year last aforesaid, the following further proceedings were had in said court and entered of record in said cause, to wit:

Order allowing writ of error.

SOCIETY FOR SAVINGS
v.
COUNTY OF CLAY. } Assumpsit.

And now on this 8th day of March, 1881, come again the parties by their counsel, and on motion of the defendant a writ of error to the Supreme Court of the United States is allowed not to operate as a supersedeas, on its entering into bond to the plaintiff in the penalty of five thousand dollars, with security to be approved by the court, conditioned as the law directs, which bond is now filed and approved by the court.

Whereupon, on the same day and in the year last aforesaid, came the defendant and filed its bond on writ of error in said cause; which said bond is in the words and figures following, to wit:

63 *Bond on writ of error.*

Know all men by these presents that we, the County of Clay, in the State of Illinois, as principal, and William V. Vickrey, John C. Eytchison, Alexander M. E. Martin, Pearley P. Brown, John Erwin, Robert McCallum, John Ditter, Alexander W. Bothwell, Randolph Smith, Edward H. Hawkins, and John I. McCauley, as security, are held and bound unto the Society for Saving in the penal sum of five thousand dollars, for the payment of which we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents; dated this eighth day of March, A. D. 1881.

For that whereas, at the January term of the circuit court of the United States within and for the southern district of Illinois, the So-

ciety for Savings recovered a judgment at law against the County of Clay aforesaid for the sum of twenty-seven thousand two hundred and twenty-four dollars and eighteen cents, from which said judgment the County of Clay has prayed an appeal from the judgment of said
64 circuit court to the Supreme Court of the United States:

Now, if the said County of Clay shall prosecute its appeal to effect, and if it fails to make good its plea shall answer all damages and costs that may be adjudged against it, then this obligation to be void; otherwise to be and remain in full force and effect.

In testimony whereof the said County of Clay has hereunto, by its county clerk, duly signed said bond and affixed the seal of said county thereto, and that said securities have hereunto set their hands and seals this eighth day of March, A. D. 1881.

THE COUNTY OF CLAY,
[SEAL.] By RICHARD J. BURNS, *Clerk.*
ROBERT McCALLUM. [SEAL.]
JOHN DITTER. [SEAL.]
ALEXANDER W. BOTHWELL. [SEAL.]
RANDOLPH SMITH. [SEAL.]
EDWARD H. HAWKINS. [SEAL.]
JOHN I. McCAWLEY. [SEAL.]
WILLIAM V. VICKREY. [SEAL.]
JOHN C. EYTCHISON. [SEAL.]
ALEXANDER M. E. MARTIN. [SEAL.]
P. P. BROWN. [SEAL.]
JOHN ERWIN. [SEAL.]

STATE OF ILLINOIS,
Clay County, ss:

I, Richard J. Burns, county clerk in and for said county of
65 Clay, do hereby certify that I am personally acquainted with each of the parties whose names appear as sureties on the foregoing bond, and that the said securities are worth, over and above all liabilities and exemptions, at least the sum of fifty thousand dollars.

Witness my hand and official seal this 8th day of March, A. D. 1881.

[L. S.] RICHARD J. BURNS,
County Clerk, Clay County, Illinois.

Approved but not to operate as a supersedeas.

S. H. TREAT,
Dist. Judge.

(Indorsed:) Filed March 8, 1881. J. A. Jones, clerk.

66 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

In the circuit court.

I, John A. Jones, clerk of the circuit court of the United States for the said southern district of Illinois, do hereby certify that the foregoing is a true and perfect copy of the papers filed and the proceedings thereon had in a certain cause lately pending in said court, wherein

The Society for Savings was plaintiff and The County of Clay was defendant, as fully as the same appear on file and of record in my office.

In testimony whereof I have hereunto set my hand affixed the seal of said court, at my office in Springfield, in said district, this 3d day of September, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth year.

[SEAL.] J. A. JONES, *Clerk.*

67 *Citation.*

UNITED STATES OF AMERICA.

To the Society for Savings, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein The County of Clay is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, S. H. Treat, district judge of said district, and one of the judges of said circuit court, this 16th day of September, A. D. 1881.

S. H. TREAT, *Dist. Judge.*

I hereby accept service of the foregoing citation this 20' day of September, A. D. 1881.

DAVID T. LITTLER,
Att'y for Def't in Error.

(Indorsed:) No. 6025. Society for Savings vs. County of Clay. Citation.

68 The County of Clay, plaintiff in error, complains that error has intervened in the foregoing record and proceedings and that the errors are in these:

1st. The court erred in rendering judgment for the plaintiff, and against the defendant.

2nd. The court erred in finding that the county of Clay had authority to donate $50,000 to aid in the construction of the Illinois Southeastern Railway.

3rd. The court erred in finding that the board of supervisors of Clay County had authority, on the 22nd day of April, 1868, to submit the question of the donation of $50,000 to a vote of the legal voters of said county, and afterwards, on the 4th day of January, 1871, and after the new constitution took effect, to issue said donation bonds in pursuance of said vote, there being no authority under the charter of said railway company to submit the question of donating $50,000 or any less sum to a vote of the people.

4th. The court erred in finding that the county of Clay had authority to issue $50,000 of donation bonds, and $100,000 of subscription bonds.

69 5th. The court erred in finding that the county of Clay had authority to subscribe $100,000 to aid in the construction of said railway, the said county being expressly limited by the charter to a donation not to exceed $100,000.

6th. The court erred in finding that the county of Clay had authority, after the acceptance of the amendatory act of February 24th, 1869, to make subscription and issue bonds without complying with the requirements of section 10 of said amendatory act.

7th. The court erred in finding that a subscription of $100,000 had been made by said county to said railway company before the taking effect of the amendatory act of February 24th, 1869, so as to save the proceedings that before that time had been had, with a view to donating and subscribing to said railway company and issuing bonds therefor.

8th. The court erred in holding that the conditions appearing upon the face of said bond and certified to have been complied with by the clerk of the county court under the order of the county court (instead of under the order of the board of supervisors) rendered the bonds negotiable and a binding obligation upon said county.

The plaintiff in error therefore prays that said cause may be reversed.

W. J. HENRY,
Attorney for Pl'ff in Error.

(Indorsement on cover:) No. 1006. The County of Clay, plaintiff in error, vs. The Society for Savings. S. Illinois, C. C. U. S. Filed October 10th, 1881.

FILED
NOV 12 1881

—IN THE—

United States Supreme Court

OCTOBER TERM, A. D. 1881.

No. 1006

THE COUNTY OF CLAY,
Plaintiff in Error,
vs.
THE SOCIETY FOR SAVINGS,
Defendant in Error.

} Appeal from the Southern District of Illinois.

ABSTRACT AND BRIEF.

W. J. HENRY,
Attorney for Plaintiff In Error.

THE COUNTY OF CLAY,
vs.
THE SOCIETY FOR SAVINGS,

Appeal from the Southern District of Illinois.

ABSTRACT AND BRIEF.

This is an action of assumpsit brought on bonds and coupons purporting to be issued by the county of Clay to the Illinois Southeastern Railway Company, aggregating the sum of $27,224.18.

To the declaration the defendant pleaded the general issue verified by affidavit. The case was tried by the court without the intervention of a jury, upon an agreed statement of facts, from which the court finds:

First, That the Illinois Southeastern Railway Com-

15 pany was incorporated on the 26th day of February, 1867, under a special act of incorporation.

Second, That on the 2d day of March, 1868, an order was made by the board of supervisors of Clay county, submitting the question of whether the county would subscribe $100,000 to said railway company, to a vote of the people, at an election to be held on the 22d day of April, 1868. The subscription to be paid for in bonds, to bear interest at the rate of seven per cent. per annum, interest to be paid half yearly in the city of New York, bonds to run twenty years with the privilege of paying the same at any time after five years, the bonds to be delivered to the railway company as follows: One fourth when ten consecutive miles of the road is graded, bridged and tied ready for the iron, in the county of Clay, and not sooner; one fourth when another ten miles shall be completed as aforesaid; another one-half when the grading, bridging and tieing of said road shall be completed from the Southern boundary line of Clay county to its junction with the Chicago branch of the Illinois Central railroad, and not sooner; and that the line of said railroad shall be located and run within the corporate limits of the town of Louisville, in said county, and shall cross the present road bed of the Ohio & Mississippi railroad at some point not further east than the center of the northeast quarter of section 25, town 3, north of range 6 east, and not further west than the center of the south-

west quarter of section 26, town and range as aforesai and that a tax be levied and collected for the payment the principal and interest of said bonds.

That all of the aforesaid proposition as to subscri tion and location be voted upon as one question, and tha at said election the following additional proposition sha be voted upon, as to whether said county will donat $50,000 to said railway company, subject to the sam conditions as hereinbefore provided.

That in payment of such donation the county issu bonds payable to the directors of said railway company such bonds to bear interest from the completion of such railway through the county of Clay, at the rate of seven per cent. per annum, interest payable half yearly on the first days of January and July; said bonds to be so drawn as to give the county of Clay the right to pay them at any time after ten years from the date of issuing the same; said bonds to be due in twenty years, the county not to be liable to pay said bonds or any interest upon them until said railway shall be completed the whole length of the line, from Shawneetown to the Chicago branch of the Illinois Central railroad and cars running thereon, and each of said bonds so donated shall declare upon its face the conditions upon which it is to become due.

Third, The court further finds from the evidence

that an election was held on the 22d day of April, 1868, in accordance with the order of the board of supervisors and resulted in a majority of the votes being cast in said county, in favor of said proposition.

Fourth, The court further finds from the evidence that at a special meeting of the board of supervisors of said county. held on the first Monday of November, 1868, the president of said board of supervisors was instructed by resolution duly passed by said board of supervisors, to make such donation and to subscribe said amount upon the books of said railway company, said subscription and donation to be made strictly and only in accordance with the terms of the propositions aforesaid, submitted and voted upon on the 22d day of April, 1868.

Fifth, The court further finds from the evidence that said railroad company graded, bridged and tied ten miles thereof, before the *first day of November*, 1869, and that on that day the *president of the board of supervisors made the subscription upon the books of the Illinois Southeastern Railway Company*, under and in pursuance of the resolution aforesaid, said subscription being then made upon the terms and conditions aforesaid.

Sixth, The court further finds from the evidence that the $100,000 of bonds voted and subscribed as aforesaid was delivered to the railway company on the 1st day of November, 1869, said railway company having com-

plied with the terms and conditions of said vote.

Seventh, The court further finds from the evidence that on the 1st day of January, 1871, the $50,000, so donated as aforesaid, under and in pursuance of the vote aforesaid, in the bonds of said county, was delivered and donated to said railway company, said railway company having complied with the conditions of said vote and having completed its line of railway from Shawneetown to the Chicago branch of the Illinois Central railroad.

Eighth, The court further finds from the evidence that the bonds were registered in the office of the auditor of public accounts, taxes levied and interest paid on said bonds up to the time of the commencement of this suit.

Ninth, The court further finds from the evidence that *on the 24th day of February*, 1869, the legislature of the State of Illinois passed an act amending the charter of the *Illinois Southeastern Railway Company*, which amendment of the act was duly accepted by said railway company and became a part of the charter of the Illinois Southeastern Railway Company.

Tenth, The court further finds from the evidence that said bonds of subscription are each in the words and figures following, to-wit:

"No. 24 United States of America. $1,000

"State of *Vignette.* Illinois.

"Clay County Railroad Bond.

"Registered by Auditor of Public Accounts of the State of Illinois. "*Vignette.*	Principal and Interest Collected and Paid by the Treasurer of the State of Illinois.

"Know all men by these presents. that the County of Clay, State of Illinois, acknowledges itself to owe and be indebted to the Illinois Southeastern Railway Company, or bearer, in the sum of One Thousand Dollars, which sum the said County of Clay promises to pay at the American Exchange National Bank in the city of New York, on the 1st day of January, A.D. 1890, the said county reserving the right to pay this bond at any time after five years from the date of its issue, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of July and January of each year on the presentation and surrender of the annexed coupons. This bond being issued under and pursuant to orders of the Board of Supervisors of Clay County, Illinois, for subscription to the capital stock of the Illinois Southeastern Railway Company, as authorized by virtue of the laws of the State of Illinois. And the faith of the County of Clay is hereby irrevocably pledged for the payment of said principal and interest as aforesaid.

"In testimony whereof, the said County of Clay has executed this bond by causing the chairman of the Board of Supervisors to subscribe his name hereto, and to be countersigned by the Clerk of this County and affixing the seal of said Court, all of which is done at Louisville,

Illinois, by and under the order of the Board of Supervisors of Clay County, this 1st day of November, A. D. 1869.

WM. B. WILSON,
Seal. Chairman of the Board of Supervisors.

"Countersigned by
"C. D. KENDALL,
"Clerk of the County Court."

Also that said donation bonds are in the words and figures, to-wit:

"No. 8. United States of America. $1,000.

"State of *Vignette.* Illinois.

"Clay County Railroad Bonds.

"Registered by Auditor of Public Accounts of the State of Illinois. "*Vignette.*	Principal and Interest Collected and paid by the Treasurer of the State of Illinois.

"Know all men by these presents, that the County of Clay, State of Illinois, acknowledges itself to owe and be indebted to the Illinois Southeastern Railway Company, or bearer, in the sum of One Thousand Dollars, which sum the said County of Clay promises to pay at the American Exchange National Bank in the city of New York on the 1st day of January, A. D. 1890, the said county reserving the right to pay this bond at any time after ten years from the date of its issue, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of July and January of each year on the presentation and surrender of the annexed coupons: This bond is one of a series of bonds issued

"No. 24 United States of America. $1,000

"State of *Vignette.* Illinois.

"Clay County Railroad Bond.

"Registered by Auditor of Public Accounts of the State of Illinois. "*Vignette.*	Principal and Interest Collected and Paid by the Treasurer of the State of Illinois.

"Know all men by these presents. that the County of Clay, State of Illinois, acknowledges itself to owe and be indebted to the Illinois Southeastern Railway Company, or bearer, in the sum of One Thousand Dollars, which sum the said County of Clay promises to pay at the American Exchange National Bank in the city of New York, on the 1st day of January, A.D. 1890, the said county reserving the right to pay this bond at any time after five years from the date of its issue, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of July and January of each year on the presentation and surrender of the annexed coupons. This bond being issued under and pursuant to orders of the Board of Supervisors of Clay County, Illinois, for subscription to the capital stock of the Illinois Southeastern Railway Company, as authorized by virtue of the laws of the State of Illinois. And the faith of the County of Clay is hereby irrevocably pledged for the payment of said principal and interest as aforesaid.

"In testimony whereof, the said County of Clay has executed this bond by causing the chairman of the Board of Supervisors to subscribe his name hereto, and to be countersigned by the Clerk of this County and affixing the seal of said Court, all of which is done at Louisville,

Illinois, by and under the order of the Board of Supervisors of Clay County, this 1st day of November, A. D. 1869.

WM. B. WILSON,

Seal. Chairman of the Board of Supervisors.

"Countersigned by

"C. D. KENDALL,

"Clerk of the County Court."

Also that said donation bonds are in the words and figures, to-wit:

"No. 8. United States of America. $1,000.

"State of *Vignette.* Illinois.

"Clay County Railroad Bonds.

"Registered by Auditor of Public Accounts of the State of Illinois. "*Vignette.*	Principal and Interest Collected and paid by the Treasurer of the State of Illinois.

"Know all men by these presents, that the County of Clay, State of Illinois, acknowledges itself to owe and be indebted to the Illinois Southeastern Railway Company, or bearer, in the sum of One Thousand Dollars, which sum the said County of Clay promises to pay at the American Exchange National Bank in the city of New York on the 1st day of January, A. D. 1890, the said county reserving the right to pay this bond at any time after ten years from the date of its issue, with interest at the rate of seven per centum per annum, payable semi-annually on the first days of July and January of each year on the presentation and surrender of the annexed coupons: This bond is one of a series of bonds issued

by Clay County, to aid in the construction of the Illinois Southeastern Railway in pursuance of the authority conferred by an act of the General Assembly of the State of Illinois, entitled 'an act to incorporate the Illinois Southeastern Railway Company, approved February 25th, 1867, and an act amendatory thereof, approved February 24th, 1869, and of an election of the legal voters of Clay County, Illinois, held on the 22nd day of April, A. D. 1868, under the provisions of said act.

"This bond is not to become a binding obligation on the said county of Clay, until the following conditions shall have been complied with, to-wit: This bond to become due and payable on the express condition that said company shall have completed the whole length of its line from Shawneetown on the Ohio river to the Chicago branch of the Illinois Central railroad, and shall have the cars running thereon. And for the payment of the said sum of money and the interest accruing thereon in the monner aforesaid, upon the performance of said condition the faith of said county of Clay is hereby irrevocably pledged. In testimony whereof the said county of Clay has executed this bond by causing the Chairman of the Board of Supervisors to subscribe his name hereunto, and to be countersigned by the clerk of this court, and affixing the seal of said court.

"All of which is done by and under orders of the Board of Supervisors of Clay County at Louisville, this the 4th day of July, A. D. 1871. WM. B. WILSON,

Seal.

Chairman of Board of Supervisors.

"Countersigned by

"C. D. KENDALL,

"Clerk of the County Court."

Eleventh, The county clerk's certificate that the county court of said county has entered an order on the records of said county court, directing me to endorse upon this bond the following words, to-wit: 23

"All the conditions upon which this bond was to become a binding obligation of the county of Clay have been complied with."

"The court found the issue for the plaintiff and rendered judgment for the sum of $27,224.18, from which judgment the defendant prosecuted a writ of error and brings the record into this court, and assigns the following errors: 24

1st. The court erred in rendering judgment for the plaintiff and against the defendant. 25

2d. The court erred in finding that the county of Clay had authority to donate $50,000 to aid in the construction of the Illinois Southeastern Railway. 26

3d. The court erred in finding that the board of supervisors of Clay county had authority on the 22d day of April 1868 to submit the question of the donation of $50,000 to a vote of the legal voters of said county, and afterwards on the 4th day of January, 1871, and after the new constitution took effect, to issue said donation bonds, in pursuance of said vote, there being no authority under the charter of said railway company to sub- 27

by Clay County, to aid in the construction of the Illinois Southeastern Railway in pursuance of the authority conferred by an act of the General Assembly of the State of Illinois, entitled 'an act to incorporate the Illinois Southeastern Railway Company, approved February 25th, 1867, and an act amendatory thereof, approved February 24th, 1869, and of an election of the legal voters of Clay County, Illinois, held on the 22nd day of April, A. D. 1868, under the provisions of said act.

"This bond is not to become a binding obligation on the said county of Clay, until the following conditions shall have been complied with, to-wit: This bond to become due and payable on the express condition that said company shall have completed the whole length of its line from Shawneetown on the Ohio river to the Chicago branch of the Illinois Central railroad, and shall have the cars running thereon. And for the payment of the said sum of money and the interest accruing thereon in the monner aforesaid, upon the performance of said condition the faith of said county of Clay is hereby irrevocably pledged. In testimony whereof the said county of Clay has executed this bond by causing the Chairman of the Board of Supervisors to subscribe his name hereunto, and to be countersigned by the clerk of this court, and affixing the seal of said court.

"All of which is done by and under orders of the Board of Supervisors of Clay County at Louisville, this the 4th day of July, A. D. 1871.

Seal.

WM. B. WILSON,
Chairman of Board of Supervisors.

"Countersigned by
"C. D. KENDALL,
"Clerk of the County Court."

Eleventh, The county clerk's certificate that the county court of said county has entered an order on the records of said county court, directing me to endorse upon this bond the following words, to-wit: 23

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2d. The court erred in finding that the county of Clay had authority to donate $50,000 to aid in the construction of the Illinois Southeastern Railway. 26

3d. The court erred in finding that the board of supervisors of Clay county had authority on the 22d day of April 1868 to submit the question of the donation of $50,000 to a vote of the legal voters of said county, and afterwards on the 4th day of January, 1871, and after the new constitution took effect, to issue said donation bonds, in pursuance of said vote, there being no authority under the charter of said railway company to sub- 26

mit the question of donating $50,000 or any less sum to a vote of the people.

26 4th. The court erred in finding that the county of Clay had authority to issue $50,000 of donation bonds and $100,000 of subscription bonds.

26 5th. The court erred in finding that the county of Clay had authority to subscribe $100,000 to aid in the construction of said railway, the said county being expressly limited by the charter to a donation not to exceed $100,000.

27 6th. The court erred in finding that the county of Clay had authority after the acceptance of the amendatory act of February 24th, 1869, to make subscription and issue bonds without complying with the requirements of section 10 of said amendatory act.

27 7th. The court erred in finding that a subscription of $100,000 had been made by said county to said railway company before the taking effect of the amendatory act of February 24th, 1869, so as to save the proceedings that before that time had been had with a view to donating and subscribing to said railway company and issuing bonds therefor.

27 8th. The court erred in holding that the conditions appearing upon the face of said bond and certified to

have been complied with by the clerk of the county court, under the order of the county court, instead of under the order of the board of supervisors rendered the bonds negotiable and a binding obligation upon said county.

For these reasons we insist that the judgment of the circuit court should be reversed.

W. J. HENRY,
Attorney for Plaintiff in Error.

[Leader Print, Shelbyville, Illinois.]

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ACT OF NOVEMBER 6TH, 1849.

SUBSCRIPTIONS—LOANS.

Subscriptions in Aid of Railroads.—"Whenever the citizens of any city or county in this State are desirous that said city or county should subscribe for stock in any railroad company already organized or incorporated, or hereafter to be organized or incorporated under any law of this State, such city or county may, and are hereby authorized to purchase or subscribe for shares of the capital stock in any such company, in any sum not exceeding $100,000, for each of such cities or counties, and the stock so subscribed for or purchased shall be under the control of the county court of the county, or common council of the city, making such subscription or purchase, in all respects as stock owned by individuals.

"For the payment of said stock, the judges of the county court of the county, or the common council of the city making such subscription or purchase, are hereby authorized to borrow money at a rate not exceeding 10 per cent. per annum, and to pledge the faith of the county or city for the annual payment of the interes and the ultimate redemption of the principal, or if the said judges or common council should deem it more advisable, they are hereby authorized to pay for such subscription or purchase in bonds of the city or county, making such subscription to be drawn for that purchase in sums not less than $50, bearing interest not exceeding

10 per cent. per annum: Provided, that no bond shall be paid out out at less than par value.

The railroad companies already organized or incorporated, or hereafter to be organized or incorporated under the laws of this State, are hereby authorized to receive the bonds of any county or city becoming subscribers to the capital stock of such company, at par, and in lieu of cash, and to issue their bonds bearing interest not exceeding 10 per cent. per annum for any moneys by them borrowed for the construction of their railroad and fixtures, or for the purchase of engines and cars, and for such purpose may dispose of any bonds by them received as aforesaid.

"No subscription shall be made, or purchase or bond issued by any county or city under the provisions of this act, whereby any debt shall be created by said judges of the county court of any county, or by the common council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city, (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this act for county officers) shall vote for the same; and the judges of the county court of any county, or the common council of any city, desiring to take stock as aforesaid, shall give at least 30 days' notice, in the same manner as notices are given for election of State or county officers in said coun-

ties, requiring said electors of said counties or said cities to vote upon the day named in such notices, at their usual place of voting, for or against the subscription for said capital stock which they may propose to make, and said notices shall specify the company in which stock is proposed to be subscribed, the amount which it is proposed to take, and the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear; or in case it is proposed to borrow money to pay such subscription, then the notices shall state the terms upon which such loan is to be effected; and the opinion of the electors shall be expressed upon their ballots, 'For subscription,' or 'Against subscription,' and counted and returned by the judges and clerks of elections, as in other cases; and it a majority of the voters of said county or city, assuming the standard aforesaid, shall be in favor of the same, such authorized subscription or purchase, or any part thereof, shall then be made by or by said judges or common council. In case any election had under this act, is held upon a day of a general election, then the number of votes thrown at such general election for county officers shall be the standard of the number of qualified voters as aforesaid. No bonds shall be issued under the provisions of this act by any county or city, excepting for the amounts required to be paid at the time of subscription, and for the amounts of and at the time when assessments upon all the stockholders of said company shall be regularly assessed and made payable."

The foregoing are sections 93, 94, 95 and 96 in full, under the general title Railroad. Statutes of Illinois, (Gross) 3d ed., pp 552–3.

SECTION 7 OF AN ACT TO INCORPORATE THE ILLINOIS SOUTHEASTERN RAILWAY COMPANY. IN FORCE FEBRUARY 26, 1867.

"The county court, or board of supervisors, (where such county has adopted township organization) of any county into or through which this road or its branches may pass, is hereby authorized and fully empowered to donate to said company, as a bonus or inducement towards the building of said railroad or its branches, any sum not exceeding one hundred thousand dollars, and may order the clerk of the county court or board of supervisors of such county to issue bonds of the county to the amount donated; and such clerk of the county court or board of supervisors, as the case may be, of such county, shall countersign and deliver such bonds so issued to the president or directors of said company; which said bonds may bear any rate of interest not to exceed ten per cent. per annum, payable at the maturity of the bonds, as hereinafter expressed, and yearly thereafter: *Provided*, that no donation by the county court or board of supervisors of any such county shall be of a greater sum than fifty thousand dollars, until the question of such larger donation shall have been submitted to the legal

voters of such county, at an election to be called, conducted, returns made, canvassed and published, in the usual manner of calling, conducting, making returns, canvossing and publishing special county elections; at which election each voter shall vote a ticket upon which is written or printed the words 'For donation' or 'Against donation;' and if a majority of the ballots cast at such an election be in favor of donation, it shall be the duty of the county court or board of supervisors of such county so voting to donate some amount, not less than fifty thousand dollars nor more than one hundred thousand dollars, to said company, and to order the issuing of bonds of the county, as hereinbefore provided, for the amount so donated; which bonds shall be made payable to the directors of said company, and may be in any denomination of not less than one hundred nor more than one thousand dollars each, at the discretion of the said county court so issuing the same: *Provided*, that the bonds of any county so donated and issued shall not mature nor become due or payable nor any of the interest accruing thereon or upon any part thereof, until the said company shall have completed or caused to be completed so much of the line of said road or its branches as may be within the county so donating, or when some certain specified section or part of the road shall have been finished, as may be agreed upon between this company and county court or board of supervisors of the county making the donation; and each of said bonds shall declare

upon its face the conditions upon which it is to become due."

SECTIONS 10 AND 12 OF AN ACT TO AMEND AN ACT ENTITLED AN ACT TO INCORPORATE THE ILLINOIS SOUTHEASTERN RAILWAY COMPANY. IN FORCE FEBRUARY 24, 1869.

"That any village, city, county or townsnip organized under the township organization law, or any other law of this State, along or near the route of said railway or its branches or that are in any wise interested therein, may, in their corporate capacity, subscribe to the stock of said company or make donations to said company, to aid in constructing and equipping said railway: *Provided*, that no such subscriptions or donations shall be made until the same shall be voted for, as hereinafter provided. That whenever twenty legal voters of any such city, village, county or township shall present to the clerk thereof a written application requesting that an election shall be held to determine whether such village, city, county or township shall subscribe to the capital stock of said company or make a donation thereto, to aid in building or equipping said railway, stating the amount, and whether to be subscribed or donated, and the rate of interest and times of payment of the bonds to be issued in payment thereof, such clerk shall receive and file such application, and shall immediately proceed to post written or printed

notices, calling an election to be held by the legal voters of such village, city, county or township, which notice shall be posted in ten of the most public places of such village, city, county or township, for thirty days preceding an election; and said notices shall state fully the object of such election, and such election shall be held and conducted and returns thereof made as in general elections provided by law in this State, and as provided by the charters of any such village or city: *Provided*, that at any election held under the provisions of this act it shall not be necessary to cause a registration of the voters of such villages, cities, counties or townships; and if a majority of the votes cast at such election shall be in favor of such subscription or donation, then the corporate authorities of such village, city, county or township organized under the township organization laws of this State, the supervisors of such township shall subscribe to the capital stock of said company or donate thereto, as shall have been determined at such election, the amount so voted at such election, and shall issue the bonds, with interest coupons attached, of such village, city, county or township to said railway company, in such denominations as said railway company may designate—said bonds drawing interest at a rate not exceeding ten per cent. per annum, and the interest on said bonds to be paid semi-annually, and said bonds to be paid in twenty years from the date of their issue, with the privilege reserved to the said villages, cities, counties or town-

ships of paying said bonds at any time after five years from the date of their issue; and said bonds to be signed, in case of a village by the chairman of the board of trustees thereof, in case of a city by the mayor thereof, in case of a county by the county judge or the chairman of the board of supervisors thereof, and in case of a township by the supervisor thereof; and in all cases to be countersigned by the clerk of said village, city, county or township. And any such village, city, county or township subscribing or making donation to such railway, as aforesaid, shall by its proper corporate authorities, annually thereafter, levy and collect a sufficient tax on its assessed property to pay the interest on its bonds issued as aforesaid as the interest becomes due, and provide in due time to pay the principal at maturity.

That when payment of subscription to the capital stock of said company or payments for donations to said company have been or shall be made by villages, cities, counties or townships, in bonds of such villages, cities, counties or townships, under any act authorizing such subscription or donation to be made, all such bonds issued or negotiated by the proper authorities of such villages, cities, counties or townships, and appearing regular on the face thereof, shall in the hands of said company or any other *bona fide* holder thereof, be deemed and taken in all courts and elsewhere, as *prima facie* evidence of the regularity of everything required by the several acts in relation to the issuing of said bonds or by any other act to be done preliminary to the issuing and negotiation of said bonds.

HAGLE & FINCH AND HENRY, COOK & LORD,

FOR PLAINTIFF IN ERROR.

This is a suit brought on certain bonds and coupons purporting to have been issued by the county of Clay to the Illinois Southeastern Railway Company on the first day of November, 1869, and subsequent to that time, to pay for subscription aggregating $100,000, and $50,000 as donation bonds.

The order of the board of supervisors under which the bonds purport to have been issued, submitting the question of subscription and donation to a vote of the people, was made on the 2d day of March, 1868, calling an election to be held on the *22d day of April*, 1868. The

subscription and donation were both dependent upon certain conditions recited in the order of submission.

By the terms of the submission the subscription bonds were to be issued in installments upon the performance of certain precedent conditions recited in the order.

The donation bonds were to be issued when the road was completed from Shawneetown to the Chicago branch of the Illinois Central Railroad. These latter bonds were not issued until *January* 1*st*, 1871, and until after the new constitution took effect and became the organic law of the State.

THE SUBSCRIPTION BONDS.

This class of bonds recite that they were issued in pursuance of an order made by the board of supervisors. No reference whatever is made in the bonds to an election or to any law or authority under which the bonds were issued; hence the bonds are not aided by recitals. The bonds upon their face show no authority beyond the mere naked and unauthorized act of the board of supervisors.

No authority is conferred by the charter incorporating the Illinois Southeastern Railway Company upon the board of supervisors to make subscription and issue bonds.

By reference to section 7 of the charter it will be

seen that the board of supervisors are authorized to donate as a bonus or inducement toward the building of the railroad or its branches any sum not exceeding $100,000. The authority, if any exists, must be found in the act of Nov. 6th, 1849, which we have set out in our abstract in full. Under that act, the authority is not conferred upon the supervisors until they are authorized by a vote of a majority of the qualified voters of such county, taking as a standard the number of votes thrown at the last general election, previous to the vote had upon the question of subscription under this act, for county officers.

It is not insisted that it is essential to the validity of the bonds under this act that the authority of the board of supervisors should be recited upon the face of the bond, but it is insisted that the authority must exist, and where it is not recited upon the face of the bond, that the burthen of establishing its existence is devolved upon the holder thereof.

There is no general authority conferring jurisdiction upon the board of supervisors to make subscriptions to railway companies and issue bonds. The authority is limited and peculiar and where the law prescribes a particular mode for its exercise, that mode must be pursued.

The rule is firmly established, that the jurisdiction and authority of limited and inferior tribunals can not be presumed and must be shown affirmatively to confer

validity on their acts. Hence where the facts necessary to give such a tribunal jurisdiction do not appear on the face of its proceedings and are not proved *aliunde*, the whole will be void and may be set aside as a nullity, when called in question in the course of any collateral controversy.

Wise v. Withers. 3 Cranch, 331.

Municipal officers can not rightfully dispense with any of the essential forms of proceeding which the legislature has prescribed for the purpose of investing them with power to act in the matter of such subscriptions. Thus, where the statute provided that no bonds could be issued under its authority until the question of their issue had been submitted to the legal voters of the town at an election of which thirty days notice had been given and at which a majority of the votes should be in favor of the measure, the bonds will be invalid.

McClure v. Township of Oxford, 94 U. S., 432.

In this case there is no evidence, either from the recital in the bonds or otherwise that the law has been complied with. There is no evidence, nor finding, that the thirty days notice required by the statute had been given, or that a majority of the legal voters, taking as a standard the number of votes thrown at the last general election for county officers, voted in favor of the proposition. Certainly there is no law conferring the authority

upon the board of supervisors to issue the bonds until after a popular election has been held, resulting in favor of the measure.

Marsh v. Fulton Co., 10 Wall., 681.

Jackson Co. v. Brush, 77 Ill., 66.

THE GENERAL STATUTE WITH REFERENCE TO SUBSCRIPTION, NOT APPLICABLE.

The Illinois Southeastern Railway Company was incorporated under a special act that went into force February 26th, 1867.

Private Laws 1867, vol. 2, p. 750.

Section 7 of the charter empowered the board of supervisors to donate not to exceed $100,000; $50,000 without submitting the question to a vote of the people. But where a larger donation than $50,000 was proposed to be made, then it was provided that "no donation of the county court or board of supervisors of any such county shall be of a greater sum than $50,000 until after the question of such larger donation shall have been submitted to the legal voters of such county, at an election to be called, conducted, returns made, canvassed and published in the usual manner of calling, conducting, making returns, canvassing and publishing special county elections."

The only special county election provided for by law,

except such as are ordered by the governor to fill vacancies in certain designated offices, is the one to which we have referred, under the title and designation of subscriptions, and this undoubtedly is the one referred to in the 7th section of the act of incorporation, and from it it is manifest that it was the legislative purpose and intention that donations as therein provided should take the place of subscriptions.

We are still further fortified in this construction by what follows in the same section, after the words "for donation" or "against donation" which is, "and if a majority of the ballots cast at such election, be in favor of donation, then it shall be the duty of the county court or board of supervisors to donate some amount, not less than $50,000 or more than $100,000 to said company, and to order the issuing of bonds of the county as therein before provided for the amount so donated.

The object of the general statute with reference to subscription and this section of the charter are primarily and substantially the same, that is to aid the building of the railway. The only observable difference is that the donations provided for, being more favorable to the railway company than subscription. Both the charter and the general statute limits the amount to an amount not exceeding $100,000. Under the charter the vote makes it the duty of the board of supervisors to donate the amount voted. Under the general statute the vote to make the

subscription simply confers the authority upon the board of supervisors, but does not impose its exercise as a mandatory duty to make the subscription, but leaves it discretionary with them whether to make it or not.

The policy of the State has always been, while the power was recognized as subsisting, to limit the amount to be subscribed and it cannot be successfully maintained that the limitation was intended to be avoided by this corporate grant of an amount not exceeding $100,000 that might be donated; in other words it was not an additional grant of power, thereby enabling the counties through which the road passes to each subscribe $100,000 under the general statute and donate an additional $100,000. On the contrary, manifestly, it was the intention of the legislature to make this provision of the charter as applied to this company a revision of the general statute and a substitute for the subscription authorized by the general statute. This construction is strictly in accordance with the canons of construction, adopted by the almost universal adjudication of the courts.

County of Cass v Gillett, 100 U. S. 592.

Scuyler v. Thomas 98 U. S. 169.

Smith v. Clark County, 54 Mo., 58.

The supreme court of the United States while considering the question of repeal by implication, uses this

language: "Even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

U S. v. Tynen, 11 Wall., 92.

In the case of *Nichols v. Squires*, 5 Pick., 168, it was said with reference to the statute of 1800, section 57, that while it seemed to have a different object in view from the statute of 1817, section 191, the latter statute appears to cover the whole subject matter. By the statute of 1817, the selling of tickets in any lottery not permitted by this commonwealth is prohibited under a new penalty and where the legislature imposes a second penalty, whether a smaller or a larger one, a party can not be allowed to sue on one or the other at his option. The point of repeal by implication is supported by authority.

Dwarris on Statutes, 673.

In the case of *Bartlett v. King*, 12 Mass., 537, an exceedingly useful statute, passed in 1754 concerning donations and bequests to pious and charitable uses, was held not to be in force, the legislature having in 1785 legislated upon the same subject and omitted to re-enact the provisions of that statute. So here the legislature in the passage of this special charter had in view the whole subject of municipal aid with reference to the building of this

railway. They changed the form of affording the aid from subscriptions to donations, for the benefit of the company, but continued the *limitation of* $100,000 *in force.*

The rule as early settled by the supreme court of Illinois is, that a subsequent statute revising the subject of a former one and intended as a substitute for it, although it contains no express words to that effect, operates as a repeal of the former.

Ill. & Mich. Canal v. Chicago, 14 Ill., 335.

Booth v. Town of Carthage, 67 Ill., 104.

Culver v. 3d Nat. Bank, Chicago, 64 Ill., 534.

Towle v. Manlette, 3 Greenleaf, 22.

Pulaski Co. v. Donnelly, 5 English, 588.

Butler v. Palmer, 1 Hill. 326.

Springfield v. Hampden Com'rs, 6 Pick, 503.

The question of whether a distinction existed between a donation in aid of a railway and a subscription to the capital stock of the railway company, by a municipal corporation, came before the supreme court of this State in the case of the *C. D. & V. R. R. Co. v. Smith*, 62 Ill., 277, and the court used this language: "The distinction is more apparent than real; indeed, to our view, is entirely

shadowy. No principle would justify the authority to a municipal corporation to become a stock holder in a railroad company, merely to acquire equitable rights, and to prevent the misapplications of the funds. The power is granted in consideration of the public benefits, and these are as great in the one case as in the other."

It would be a strange anomoly in the law for the courts to hold that the high prerogative power of taxation might be resorted to for the purpose of enabling a municipal corporation to become a partner or stockholder in furtherance of a private enterprise. In all the cases where the right of subscriptions or donations have been upheld, "the decision has turned upon the question, whether the taxation by which this aid was afforded to the building of railroads, was for public purposes. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of State governments to assist by money raised from the people by taxation."

"The argument in opposition to this power has been that railroads built by corporations organized mainly for

purpose of gain—the roads which they built being under their control, and not that of the State—were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State, or the benefit of the public, except in a remote and collateral way. On the other hand it was said that roads, canals, bridges, navigable streams and all other highways, had in all times been matter of public concern."

Loan Ass. v. Topeka, 20 Wall., 660.

Hanson v. Vernon, 27 Iowa, 28.

Shapless v. Mayor, &c., 21 Pa. St., 146–167.

Allen v. Inhabitants of Jay, 60 Maine, 127.

In every instance where the power has been upheld to make donations or subscriptions to aid in the building of railways, it has been on the theory that the use for which the money was appropriated was public and the improvenent was a public benefit. In this view of the question we respectfully submit, that for the purpose of affording aid there is no distinction between subscriptions and donations, and that either subserves the same general purpose. When the charter granted by the legislature provided only for donations and limited the amount to be donated to $100,000, that excluded the right to subscribe in addition to

the donation, $100,000, and that the charter in this respect being varient from the general statute, but having the same general purpose in view, excluded the operation of the general statute so far as this particular corporation is concerned.

The rule of construction of statutes as early settled by the supreme court of this state is, that a general law does not operate as the repeal of a special law on the same subject, but that where a special law is passed it will be excepted from the operation of the general statute.

In the case of the *Trustees v. McConnell*, 12 Ill., 140, it was said: "A corporation which is a mere creature of the law *can only exercise such powers as are conferred upon it by the act of incorporation.*" In the case of *Hewitt v. Normal School District*, 94 Ill., 532, it was held, that municipalities created for governmental purposes have no powers to borrow money to purchase property on time or to give commercial paper, and unless endowed with such powers in their charters, they have no authority to make and place on the market commercial paper, and persons dealing in it must see that the power exists. This has long been the settled rule of this court.

In the case of *Baty v. Knowler*, 9 Curtis, 40, it was said, that the exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation. In the

case of *Thomas v. R. R. Co.*, 101, U. S., 71, it was said that the powers of a corporation organized under a legislative charter are only such as the statute confers, and that the enumeration of them implies the exclusion of all others.

This is undoubtedly the correct canon of construction. Especially so, when we take into consideration that the charter is in the nature of an express contract between the State and the incorporators, and therefore a corporation must show a grant either in terms or by necessary inference for all the powers it attempts to exercise.

Sharp v. Spier, 4 Hill, 79.

"All the rights which are asserted by a corporation against a State must be clearly defined and not raised by inference or presumption, and if the charter is silent about a power, it does not exist. If on a fair reading of the instrument reasonable doubts arise as to the proper interpretation to be given it, those doubts are to be solved in favor of the State, and where it is susceptible of two meanings, the one restricting and the other extending the powers of corporations, that construction is to be adopted which works the least harm to the State."

Binghamton Bridge, 3 Wall., 75.

In the case of the Charles River Bridge v. Warren Bridge, 11 Peters, 20, it was held, that the rules of

tion was presided over by a moderator, the election was void, and the supervisor when he made the subscription had not been authorized to do so by a vote of the people, taken in the manner required by the law; the subscription was therefore a nullity.

Lippincott v. Town of Pana, 92 Ill., 30.

As early as 1865, and before the law in controversy was passed, the supreme court of this State declared that if the mode prescribed in the charter for carrying into effect the right to issue the bonds had not been complied with in all material matter, the bonds are void.

Marshall Co. v. Cook, 38 Ill., 44.

Schuyler Co. v. People, 25 Ill., 181.

The rule of construction adopted by our supreme court has been steadily adhered to by an unbroken line of decision from that day until this, and is binding upon this court.

Fairfield v. County of Gallatin, 100 U. S., 48.
and authorities there cited.

This was the law of the bonds at the time they were issued, and it has received the express assent of this court, who say, that municipal officers cannot rightfully dispense with any of the essential form of proceeding which the legislature has prescribed for the purpose of in-

vesting them with power to act in the matter of such subscription.

McClure v. Township of Oxford, 94 U. S., 432.

The utmost extent to which the supreme court of the United States has ever gone, is that where there were conditions precedent required in the issue of bonds, that the determination of the proper corporate authority of a matter in *pais* which they are authorized to decide, the authority being recited in the bond, will in favor of the bondholder for value bind the corporation.

Town of Colonna v. Eaves, 92 U. S., 487.

Before, however, such recitals will bind the town, there must be authority on the part of the municipal officers to make them. This question is directly ruled in the case of East Oakland v. Skinner, 94 U. S, 256, and also Buchanan v. Litchfield, 102 U. S., 278.

In this case there was no authority to make the subscription and issue the bonds, and there are no recitals in the subscription bonds that the provisions of the charter had been complied with. The very fact that the railroad company in 1869, after the vote was taken and before the bonds were issued, applied to the legislature and obtained an amendment conferring authority to make subscriptions on certain conditions and issue bonds, is a circumstance which, when taken in connection with the course of leg-

islation, gives countenance to the construction which we contend for.

THE AMENDATORY ACT TO THE CHARTER TO INCORPORATE THE ILLINOIS SOUTH-EASTERN RAILWAY CO., APPROVED FEB. 24, 1869.

Section 10 of the amendatory act, amending the charter of the Illinois Southeastern Railway Company, is a complete revision of section 7 of the original charter with reference to both donation and subscription, and provides that any village, city, county or township organized under the township organization law, or anyother law of this State, along or near the route of said railway or its branches, or that are in any wise interested therein, may, in their corporate capacity, subscribe to the stock of said company or make donations to said company to aid in constructing and equipping said railway; provided that no such subscriptions or donations shall be made until the same shall be voted for as hereinafter provided: That whenever twenty legal voters of any such county * * * shall present to the clerk thereof a written application requesting that an election shall be held to determine whether such * * * county * * shall subscribe to the capital stock of said company, or make a donation thereto, to aid in building and equipping said railway, stating the amount and whether to be subscribed or donated, and the

rate of interest and the time of payment of the bonds to be issued in payment thereof, such clerk shall receive and file such application and shall immediately proceed to post written or printed notices calling an election to be held by the legal voters of such * * * county * * * which notice shall be posted in ten of the most public places of such * * * county * * * for thirty days preceding an election, and said notices shall state fully the objects of such election, and such election shall be held, conducted and returns thereof made as general elections provided by law in this State.

This amendment was duly accepted by the railway company and had the legal effect to annul everything that had been done in furtherance of subscriptions and donations, that did not amount at the time to an actual subscription or donation. The two provisions, the one in the general statute and the other in section 7, are clearly repugnant to the provisions for municipal aid contained in the amendatory act, and under such circumstances, according to the plain principles of law, the one last enacted operates as a repeal of the former, and where repeals are by implication, there is no such thing as saving inchoate rights.

Ill. & Mich. Canal v. Chicago, 14 Ill.. 335.

Dwarris on Statutes, 673.

The King v. The Justice of Middlesex, Barnw. & Adol., 818.

Bowen v. Lease, 5 Hill, 221.

Where a statute is repealed it must be considered, except as to transactions *past and closed*, as if it had never existed.

Dwarris on Statutes, 676.

Kay v. Goodwin, 6 Bing., 581.

McQuilkin v. Doe, 8 Blackford, 581.

Was what had been done at the time this amendatory act went into force sufficient to constitute a subscription so as to come within the saving of vested rights? There had at the time of the taking effect of this amendatory act, been an order, submitting the question to a vote of the people, made by the board of supervisors. A majority of the votes cast was in favor of the proposition. There had been an *agent appointed by the county board to make the subscription upon the books of the railway company, but no subscription had been made* at the time when this amendatory act became operative. The duty and obligation to make the subscription was not then mandatory upon the county. There were written conditions inserted in the order of the board of supervisors, under which the vote was taken, and this court cannot as a matter of law assume that the railway company would accept the donation upon the terms offered. The subscription, according to the settled construction of the gen-

eral statutes, was within the discretion of the board of supervisors. They might, at any time, either at a general or a special meeting of the board, revoke the authority of their agent appointed to make the subscription upon the books of the company, before the making thereof.

In fact the adoption and acceptance by the railway company of the amendment operated as a revocation of the authority. The agent authorized to make the subscription had been appointed for that purpose in August 1868. The Railroad Company, without procuring the subscription to be made, applied to the legislature and procured the amendment, the legal effect of which was to annul all that had been previously done toward the making of the subscription.

In support of the view that what had been done did not amount to a subscription, we desire to call the attention of the court to a few of the adjudged cases. In the case of the *County of Moultrie v. Savings Bank*, 92 U. S. 632, this court held, that where a resolution was passed by the board of supervisors to the effect that the county of Moultrie subscribe to the capital stock of the D. S. & M. R.R. Co. the sum of $80,000 to aid in the construction of a railroad by said company, in pursuance of its charter, that it amounted to a subscription to the stock of said company. The authorized body of a municipal corporation may bind it by an ordinance, which in favor of private persons interested therein, may, if so intended, operate

as a contract, or they may bind it by resolution or by a vote clothe its officers with power to act for it. The former was the clear intention in this case. The board clothed no officer with power to act for it. The resolution to subscribe was its own act, its immediate subscription.

In the case of *Nugent v. The Supervisors*, 19 Wall. 241, it was held that to constitute a subscription by a county, it is not necessary that there be an act of chirographical subscribing. A resolution of the county declaring a subscription made, an acceptance of such subscription by the railroad company and notice to the county of such acceptance, the delivery to the railroad company by the proper county officers of the county bonds, constituted an acceptance.

In the case of the *County of Bates v. Winters*, 97 U. S. 89, it was said that "an actual manual subscription on the books of the company is not indispensable, and where an order was made by a county court, which said that it subscribed for a specified number of shares of railroad stock, which was accepted by the company, that it constituted a subscription;" but the present case is quite a different one. The order of the county court was not intended, as in the cases referred to, to be final and self executing. While it recited that the sum named should be and was thereby subscribed, it authorized and directed the agent to make said subscription on the stock

books of said company upon the conditions specified, and to report to the court thereon.

The distinction between a subscription and an authority conferred upon an agent to make the subscription is so clearly marked that a reference to it is all that is required. At least the last case cited must control the decision of this court upon this question.

By reference to the records of Clay county, it will be seen by the resolution passed by the board of supervisors at the November special term, 1868, the board authorized the president to make the subscription and donation. We give the exact language of the order: "And the *president* of this *board* is hereby *authorized* and *instructed to make such donation* and to *subscribe said amount upon the books* of *said railway company.* The said donation and subscription to be made strictly and only upon and in accordance with the terms of the proposition submitted by this board upon the said 16th day of March, 1868, and voted for by the people of Clay county on the 22nd day of April, 1868, a copy of which said proposition is hereto attached and made a part of this order."

The records of the county show that the bonds were executed on the 1st day of November, 1869, and that on that day the trustee received from the county clerk $25,000, and on the 16th day of November, 1869, the trustee

received the further sum of $74,900, and that after the 2nd day of July, 1870, the railroad company received the sum of $50,000 of donation bonds. The special findings of the court show that the subscription and donation was made upon the books of the railroad company by the president of the board of supervisors on the 1st day of November, 1869, and long after the mandatory act was passed, and that it was passed at the instance of the railroad company and for its benefit, and became operative as soon as passed and had the legal effect to annul everything that had been done by way of obtaining municipal aid, that did not amount to an actual subscription or donation, or to a contract therefor, legally binding on both parties at that time.

The railroad company and all persons claiming under it at the time when these bonds were issued are chargeable with notice of the law under which the bonds were issued, if there was any law authorizing their issuance. Certainly the railroad company has no right to complain of the amendment of the authority under which the county was proposing to proceed, when such revocation of authority was brought about by their own acts in procuring the amendment and changing the supposed corporate authority; and the subsequent bond-holder has no right to complain for the reason that he was dealing in a class of securities that recited no authority known to the law under which the bonds could be issued. There

is no pretense that the bonds were issued under the amendatory act or in pursuance of an election held in accordance with the requirements of that act.

Both the agreed state of facts and the findings of the court thereon excludes the presumption that the bonds were issued in pursuance of a vote had under such act.

THE $100,000 SUBSCRIPTION WHEN VOTED DID NOT CONSTITUTE A CONTRACT BETWEEN THE RAILWAY COMPANY AND THE COUNTY.

This question is fully settled by the supreme court of Illinois, in the case of the *People Ex. Rel &c. v. The County of Tazewell*, 22 Ill. 147, in which the court say that "authorities representing counties and cities, are not compelled, when the inhabitants thereof have voted in favor of issuing bonds to aid in constructing railroads, to issue the same or to subscribe for the whole stock. There is a discretion resting with such authorities in that regard." To the same effect is the case of *The People Ex. Rel. v. Cass County*, 77 Ill. 439, where it was held, under the provisions of the same law, the authorities representing the county have a discretion, notwithstanding the vote, either to make or withhold the subscription, as the interest of the county should seem to be best subserved. This same question was incidently referred to, with approval of previous ruling, in the case of the *People v. Dutcher*, 56 Ill., 145.

In the case of *Aspinwall et al. v. The County of Daviss*, 22 How. 376–7, the supreme court of the U. S. say, that "the argument is, that the provisions in the railroad charter and the amendment conferring power upon the board of commissioners of the county and the making it their duty to subscribe for stock and issue bonds therefor if a majority of the qualified voters of the county should determine at an election in favor of the same, imports a contract with the railroad company on behalf of the state which is protected by the clause referred to in the constitution of the United States." The question was very fully considered by the court in the light of the Dartmouth College case and in the conclusion of the opinion the court say: "The election took place on the first Monday of March, 1849, when a majority of the votes was cast for the subscription. The constitution of Indiana took effect on the 1st day of November, 1851, but the subscription was not made till the 10th day of September, 1852, and the bonds were issued after this date. It is insisted that the contract of subscription became complete, when at the election a majority of the votes cast was in its favor and did not require the form of a subscription on the books for the stock of the railroad company, to make it obligatory upon the parties, and which if true it is agreed the contract would be protected within the constitution of the United States, as it would then have been complete before the constitutional prohibition of Indiana. But the court is unable to concur in

this view. It holds that a subscription was necessary to create a contract binding upon the county on the one side to take the stock and pay in bonds, and upon the other to transfer the stock and receive the bonds for the same. Until the subscription is made, the contract is unexecuted and obligatory upon neither party."

If this decision is binding upon this court, then we insist that it is conclusive in establishing the invalidity of the bonds. In the Aspinwall case the law makes it the duty of the board of commissioners to subscribe for the stock if a majority of the qualified voters at an election, determines in favor of the subscription. In the case at bar the right to make the subscription is discretionary and until such discretion is exercised in the making of it, the railroad company can claim no vested right, and when anything occurs to qualify that right or to extinguish the right, it operates as a revocation of every thing that had been done under it

The case of *Wadswoth v. The Supervisors*, decided by the supreme court of the United States at the October term, 1880, 102 U. S., 534, refers to the case of *Aspinwall v. Commissioners of Daviss County*, approvingly, the court saying: "Applying the doctrine announced in *Aspinwall &c. v. Commissioners &c.*, to the present case, it is clear that there was no binding agreement or contract between the railroad company and the county of Eau Clare, by which the latter became legally

bound, through its board of supervisors, to execute and deliver bonds to aid in the construction of the road from Tomah to Lake St. Croix. The act of April 1st, 1864, neither in express words, nor by necessary implication, made it imperative upon the board of supervisors to issue bonds in pursuance of the popular vote. The act was an enabling one, and its legal effect was to invest the board with power to supplement the expressed will of the people by an issue of bonds. We find nothing it its provisions justifying the conclusion that the popular vote was to be taken as an absolute direction that the supervisors should issue the bonds without regard to the circumstances intervening after the people had voted in favor of county aid to the enterprise in question." Further on in the opinion the court say, "but if we should be mistaken in this construction of the statute, if the statute had in terms made it the duty of the supervisors to issue bonds to the extent indicated by the popular vote, we should feel bound, upon the authority of *Aspinwall v. The Commissioners*, to hold that the legislature could, at any time before the bonds were in fact issued, or before the county came under a legal obligation to issue them, repeal, as it did the statute conferring the power to issue, and thereby withdraw from the supervisors all authority in the premises. The election at which the people gave their sanction to railroad aid, had, as we have seen, no other effect than to confer power upon the supervisors to issue bonds and did not place them under any legal obligations to the

railroad company to exercise the power granted. The railroad company had not, prior to the passage of the act of 1872, acquired any perfect or vested right to the donation. The repealing statute of 1864 was, under the circumstances, a total abrogation or obliteration of the law repealed, as much so as if the latter had never existed."

The case just cited in all its features is not distinguishable from the case at bar, even if we concede that the power to make subscriptions existed under the general law at the time that the amendment was passed amending the charter of the Illinois Southeastern Railway Company. The submission by the board of supervisors of the proposition, and the vote had in pursuance thereof, only clothed the board of supervisors with the legal discretion to issue or not to issue the bonds. That discretion had not been exercised or the contract consummated at the time that the provisions of the statute under which they were proceeding were repealed or annulled, so far as this particular corporation was concerned.

The provisions of section 10 of the amendatory act amending the charter of the Illinois Southeastern Railway Company, and the general statute with reference to subscriptions to railroad companies can not be construed as standing together in *para materia*. There are provisions that are common to both. There are other provisions that are dissimilar the one from the other. The general

statute requires a vote of the majority of the legal voters of the county, taking as the standard the number of votes thrown at the last general election, previous to the vote had upon the question of subscription under this act for county officers. The amendatory act confers the authority upon the board of supervisors when a majority of the votes cast are in favor of the proposition. The general statute requires the order for an election and the notice of such election to be made and given by the board of supervisors. The amendatory act provides that the order shall be made and notice given by the clerk of the county court, whenever a written application of twenty legal voters shall be presented to him, requesting that an election shall be held to determine whether the county will subscribe to the capital stock of the company, stating the amount, the rate of interest and the times of payments of the bonds to be issued in payment thereof. It also requires the posting of ten notices in ten of the most public places of the county for thirty days preceding an election. Said notices to state fully the object of such election, and such election to be held and conducted and returns thereof made as in general elections provided by law in this State. The amendatory act dispenses with the registration of the voters and requires that if a majority of the votes cast at such election shall be in favor of such subscription, then the corporate authorities of the county shall subscribe to the capital stock of said company the amount so voted at such election, and shall issue the

bonds with interest coupons, interest on said bonds to be paid semi-annually, and said bonds to be paid in twenty years from the date of their issue, with the privilege reserved of paying said bonds at any time after five years from the date of their issue.

Section 12 of the amendatory act makes all bonds issued or negotiated by the proper authorities of the county and appearing regular on the face thereof, in the hands of said company, or any other *bona fide* holder thereof, *prima facia* evidence of the regularity of every thing required by the several acts in relation to the issuing of said bonds or by any other act preliminary to the issue and negotiation of said bonds.

In addition to this, it is expressly provided in section ten of the amendatory act, that *no such subscription or donation shall be made until the same shall be voted for as hereinafter provided.* In virtue of these explicit directions, bearing in mind that the mode directed is the measure of power and that the provisions of section ten of the amendatory act are construed as an enabling act, it follows, that by the provisions thereof, all inchoate rights are taken away. The subscription and donation not having been completed under the original charter and under the general law before the taking effect of the amendatory act, providing that subscriptions and donations should be made, not upon the terms originally au-

thorized, but upon other and different terms, the bonds are void.

The authorities are full to the point, and uniform, that the repeal of a statute takes away all right to proceed under the repealed statute, even to the extent of suits pending at the time of the repeal, unless they are saved by a clause in the repealing statute; and that a repeal by implication growing out of repugnancy is as effective as an express repeal.

Millers Case, 1 W. Bl., 451.

Butler v. Palmer, 1 Hill, 324.

Springfield v. Overseers Highways, 6 Pick, 501.

Matter Roads in Hatfield Tp., 4 Yates, 392.

Hunt v. Jennings, 5 Blackf., 195.

Commonwealth v. Baty, 1 Watts, 382.

In the case of Van Inwagen v. Chicago, 61 Ill., 32, the court uses this language: "We believe the rule is well settled that, as to inchoat rights, rights not carried into judgment, and so not executed, cannot be, and are not, saved in the absence of a saving clause by the repealing statute. The doctrine is, that inchoate rights, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute, and unless those rights have become so far perfected as to stand indepen-

dent of the statute, that is to say, executed." Further on in the opinion the court say, "the effect of a repealing statute is to obliterate the prior law as completely from the records as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and *concluded while it was an existing law.*"

Ray v. Goodwin, 4 Moore & Payne, 341.

The clear result of all the authorities is, when a statute, as in this case, gives a right in its nature not vested, but remaining executory, if it does not become executed before a repeal of a law giving the right, it falls with the law and cannot therefore be enforced.

Schooner Rachael v. U. S. 2 Curtis, (Dec.) 421.

Calkins v. The State, 14 Ohio St., 230.

Norris v. Crocker, 19 Curtis (Dec.) 575–6.

Hartung v. The People, 22 N. Y., 97.

Butler v. Palmer, 1 Hill, 330.

THE DONATION OF $50,000 BY THE COUNTY OF CLAY.

The vote to make the donation of $50,000 was taken on the 22d day of April, 1868. At that time there was no authority to make donations under the general statute, nor under the charter, to submit the question of donating

$50,000, or any less amount than $50,000, to a vote of the people. The only authority was that which is contained in section 7 of the original charter, and that provides, that "the supervisors is hereby authorized and fully empowered to donate to said company as a bonus * * * any sum not exceeding $100,000, and may order the clerk of the county court or the board of supervisors of such county to issue bonds of the county to the amount donated, and such clerk of the county court or board of supervisors, as the case may be, of such county shall countersign and deliver such bonds so issued to the president or directors of said company * * * provided that no donation by the county court or board of supervisors of any such county shall be of a greater sum than $50,000, until after the question of such larger donation shall have been submitted to the legal voters of such county at an election." No election was held, or attempted to be held after the passage of the amendment to the charter of the Illinois Southeastern Railway Company. The election recited in the donation bonds took place on the 22d day of April, 1868. The amendatory act became a law on the 26th day of February, 1869. The bonds bear date on the day of , 1871.

It will be observed from the reading of the 7th section of the charter that it is only where the sum proposed to be donated exceeds $50,000 that there is any authority for submitting the question to a vote of the people. The

authority to donate $50,000 was expressly conferred upon the board of supervisors, without any vote or precedent condition whatever. The authority being conferred upon the board of supervisors, could not, by the board of supervisors, be delegated to the people to be voted upon at a popular election. It was an official trust conferred by the legislature upon the board of supervisors, and they are bound to pursue it strictly.

Clark v. Supervisors of Hancock County, 27 Ill., 308.

It may be admitted that if the board of supervisors had made the donation at any time before the new constitution took effect, in pursuance of the vote of the people, and issued the bonds, they would have been valid, except for the effect of the amendment of 1869. Under such circumstances the vote might have been treated as a nullity, and the authority regarded as properly exercised by the board of supervisors.

The amendatory act annulled the authority of the board of supervisors to make the donation until after the same had been submitted to a vote of the people under that act. Taking the charter, the amendatory act, the ricital in the donation bonds and section 2 of article 14 of the constitution of 1870 together, it is evident that the bonds are void, upon their face. By the provisions of that section of the constitution, the inhibition being general, it prohibited the issuing of all bonds by municipalities

to aid in the building of railroads, except such as were authorized by a vote of the people under existing laws.

There was no authority or law under which the election, held on the 22d day of April, 1868, could be legally held, and therefore it was held without warrant or authority of law.

There are two obstacles in the way of upholding this donation. The first is the repeal of the authority of the board of supervisors by the amendatory act; the second is the inhibition contained in section 2 of article 14 of the constitution of 1870.

THE BONDS ONLY PRIMA FACIE EVIDENCE OF THE REGULARITY OF THE PROCEEDING.

Section 12 of the amendment to the charter of the Illinois Southeastern Railway Company provides, that "when the payment of subscription to the capital stock of said company, or payments for donation to said company, have been, or shall be made; by villages, cities, counties or townships, in bonds of such villages, cities, counties or townships under any act authorizing any such subscriptions or donations to be made, all such bonds issued or negotiated by the proper authorities of such villages, cities, counties or townships, and appearing regular on the face thereof, shall in the hands of said company, or any other *bona fide* holder thereof, be declared and

taken in all courts, and else where, as *prima facie* evidence of the regularity of everything required by the several acts, in relation to the issuing of said bonds, or any other act to be done preliminary to the issuing and negotiation of said bonds."

This provision of the charter changes the rule with reference to the effect that is to be given to bonds in the hands of *bona fide* holders, and makes the *bona fide* holder chargeable with notice of any want of authority upon the part of the public officer to issue the bonds.

For these reasons we insist that both issues of bonds are void, and should be so declared by the court.

W. J. HENRY,
Attorney for Plaintiff in Error.

DEC 2

—IN THE—

United States Supreme Court

OCTOBER TERM, A. D. 1881.

No. 1006.

COUNTY OF CLAY,
vs.
SOCIETY FOR SAVINGS,
} Reply of Plaintiff in Error.

REPLY.

W. J. HENRY,
Attorney for Plaintiff In Error

COUNTY OF CLAY,
vs.
SOCIETY FOR SAVINGS,
} Reply of Plaintiff in Error.

It is evident that counsel for defendant in error has never read, or at least has not comprehended the questions involved.

This court in the case of The Commissioners of Knox County v. Aspinwall, 21 Howard, 545, held that the dealer in municipal bonds was bound to read the statute, or the law under which the bonds purport to be issued, and the bond.

In the case of Town of East Oakland v. Skinner, it was held that a municipality cannot subscribe for stock in a railroad corporation, unless it have the authority of the legislature for the act, and that there can be no *bona fide* holding where the statute did not, in law, authorize

the issue of the bonds. The objection in such case goes to the point of power.

94 United States, 257–8.

Campbell *et al* v. P. & D. R. R. Co., 71 Ill., 614.

Buchanan v. Litchfield, 102 U. S., 278.

The subscription bonds amounting to $100,000, make no reference to the law under which they purport to be issued. By reference, however, to section 7 of the charter of the Illinois Southeastern Railroad Company, it will be seen that authority is conferred upon counties to make donations not to exceed $100,000 in value.

Where special authority is conferred in the charter of a railroad company, such special authority takes the place of and excludes the operations of the general statute. Such has been the uniform construction placed upon special acts of incorporation by the supreme court of Illinois.

Supervisors of Schuyler County v. R. R. Co., 25 Ill., 184–5.

In that case the general statute authorized the board of supervisors, upon a vote of the people, to issue bonds. The charter of the Rock Island and Alton Railroad Company provided that certain designated counties, among which was Schuyler county, might issue bonds in aid of the railroad. The observable difference between the general statute and the charter of the company was,

that under the general statute the bonds were to be issued by the *Board of Supervisors*, while under the special statute the bonds were required to be issued by the *County Court*. The bonds in that case were issued by the *Board of Supervisors*, which would have rendered them legal, under the general statute, *if it had been in force*. Yet the court hold that the general statute was repealed by the special one, saying: "These bonds were then executed by the chairman of the board of supervisors, without the least shadow of authority."

In the case of Brackett v. The People *ex rel*, 72 Ill., 593, the syllabus is: "The provisions of the charter of a town, passed subsequent to the passage of a general law, must, as to such town, prevail over any inconsistent provisions of the general law."

Harding v. R. R. Co., 65 Ill., 91.

Bissell v. Kankakee, 64 Ill., 249.

Ryan v. Lynch *et al*, 68 Ill, 164.

Marshall Co. v. Cook, 38 Ill., 46

INNOCENT HOLDERS.

In the case of Marsh v. Fulton County, 10 Wallace, 683, it was held that the authority to contract must exist before any protection, as an innocent purchaser, can be claimed by the holder. This is the law even as respects commercial paper alleged to have been issued under del-

egated authority, as stated in the case of Floyd's Acceptances, 7 Wallace, 676.

In the case of Buchanan v. Litchfield, 102 U. S., 287, the authorities are reviewed with reference to the effect of recitals, and the court there hold that recitals will not supply the want of power.

THE AMENDATORY ACT OF FEBRUARY 24th, 1869. ITS EFFECT.

The act of February 24th, 1869, expressly prohibited the issue of municipal bonds to the Illinois Southeastern Railroad Company, either by subscription or donation, until "*the same shall be voted for, as hereinafter provided.*"

No subscription had been made at the time this amendment to the charter went into force. The circuit court find that the subscription was made on the 1st day of November, 1869. Up to that time the power to make it was discretionary with the board of supervisors.

The People *ex rel* v. County of Tazewell, 22 Ill., 151.

County of Bates v. Winters, 97 U. S., 89.

Aspinwall v. Co. of Davis, 22 Howard, 376.

Wadsworth v. Supervisors, 102 U. S., 534.

It is said by counsel upon the other side that repeals by implication are not favored, and we assent to the prop-

osition. But the provision of the amendment to the charter is not so much in the nature of a repeal as of an express special contract, and revision of the law with reference to both donations and subscriptions. It takes away all rights, which were not past and closed, as completely as if the authority had never existed.

Aspinwall v. Co. of Davis, supra.

Wadsworth v. Supervisors, supra.

THE DONATION BONDS WERE NOT NEGOTIABLE.

The record recites that the order indorsed upon the back of the bonds by the county clerk was endorsed by direction of the *county court*. (See Defendant's Brief, page 3). By section 13 of the amendatory act to the charter of the Illinois Southeastern Railroad Company it is provided that "upon a full and complete performance by said company of all the conditions upon which said bonds are to become binding obligations of the county issuing the same, it shall be the duty of the county court, or ***board of supervisors where such county is under township organization***, of the respective counties making such donations, to enter an order upon the records directing the clerk of such court to certify over his seal upon the back of each of said bonds, so issued, in language as follows, viz: 'All of the conditions upon which this bond was to become a binding obligation have been complied with.'" Each of the bonds had the indorsement upon it,

as stated in Defendant's Brief, on page 3.

At the time these bonds were issued the county of Clay was under *township organization*, and the county court *had no authority to determine* that all of the conditions upon which the donation bonds were to become binding obligations, had been complied with. The authority to make the determination belonged to the *board of supervisors*, and not to the county court. Therefore, the decision of the county court is an absolute nullity.

See Supervisors v. The People *ex rel*, 25 Ill., 185.

The donation bonds were made payable to the Illinois Southeastern Railway Company, or bearer; and expressly provide that "this bond is not to become a binding obligation on the said county of Clay, until the following conditions shall have been complied with, to-wit: This bond to become due and payable on the express condition that said company shall have completed the whole length of its line from Shawneetown on the Ohio River to the Chicago Branch of the Illinois Central Railroad, and shall have cars running thereon."

These donation bonds are *not negotiable*. They are made payable upon a *condition which may never happen*. This priciple is clearly laid down in—

Husband v. Epling, 81 Ill., 172.

Kelley v. Hemmingway, 13 Ill., 604.

Kingsbury v. Wall., 68 Ill., 311.

There was no authority to make the donation until the conditions, upon which the donation was proposed, were complied with. And before these conditions were complied with, and before the railroad company acquired any right to the donation bonds, the amendatory act of February 24th, 1869, was passed and accepted, annulling the previous action of the board of supervisors and the election.

The popular vote in favor of an appropriation was not itself an appropriation or donation.

See Town of Concord v. Savings Bank, 92 U. S., 628–9.

The decision in this case has been modified, but not to the extent of changing this principle.

No election was held subsequent to the passage of the amendatory act, under its provisions. The bonds were issued subsequent to the taking effect of section 2 of article 15 of the constitution of 1870, which only saves subscriptions where the same have been authorized under existing laws by a vote of the people prior to such adoption.

W. J. HENRY,
For Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

THE COUNTY OF CLAY,

PLAINTIFF IN ERROR,

vs.

SOCIETY FOR SAVINGS,

DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Southern District of Illinois.

BRIEF OF DEFENDANT IN ERROR,

BY

D. T. LITTLER.

SPRINGFIELD, ILL:
H. W. ROKKER, STATE PRINTER AND BINDER.
1881.

SUPREME COURT OF UNITED STATES.

THE COUNTY OF CLAY,
PLAINTIFF IN ERROR,

vs.

SOCIETY FOR SAVINGS,
DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Southern District of Illinois.

BRIEF OF DEFENDANT IN ERROR, BY D. T. LITTLER.

The plaintiff's brief contains more undisputed law on divers subjects, wholly foreign to the questions involved in the case at bar, than any document of similar length it was ever my fortune to read.

If I understand this case, it seems unnecessary to do little more than call your Honors' attention to the facts, as I think the law governing the case is well settled, and entirely familiar to the Court. The case involves the validity of two issues of railroad aid bonds, one of which was in payment of stock subscribed, and

the other a donation in aid of the road, and the facts, as disclosed by the record, are, that in pursuance of what is known as the general railroad law of Illinois, of 1849, the county of Clay, through its corporate authorities, on the 2d day of March, 1868, submitted a proposition to its legal voters whether it should subscribe $100,000 to the capital stock of the Illinois and Southeastern Railway Company, and make payment thereof in the bonds of the county. The election was held on the 22d of April following, and resulted in a majority of the said voters declaring in favor of the subscription and the issue of the bonds, upon the terms specified in the election notices. At the same time there was also submitted to said voters by said corporate authorities the further question as to whether the said county would not donate $50,000 in aid of the construction of said railroad.

There were many terms and conditions attached to said subscription and said donation. We deem it unnecessary, however, to mention them here, as the record shows that they were all fully complied with prior to the issue of the bonds.

Said election returns were duly canvassed, and the result declared to be in favor of the subscription and donation. The subscription was duly made upon the books of the railroad company, and the $100,000 subscription bonds, by order of the board of supervisors of said county, were issued November 1, 1869, and said bonds were duly registered in the office of the Auditor of State. The county received the stock of the railroad company so subscribed, and so far as the record discloses still retains it. The county also levied and collected taxes, and paid interest on the said subscription bonds from the issue thereof to the time of the bringing of this suit—1880.

The subscription bonds recite, among other things, that they were issued "as authorized by virtue of the laws of the State of Illinois." On the back of each of these bonds are printed the several sections of the general railroad law of Illinois, of 1849; also, section 12 of "An act amendatory of an act to incorporate the Springfield and Southeastern Railroad Company," approved February 24, 1869. These sections, and section 12 of the amendatory act above mentioned, are set out in full on page 19 of the record. The donation bonds were issued an the 4th day of January, 1871. A copy of this issue is set out in full on page 21 of the record. Interest was paid on this issue, from the date of their issue up to the time of the commencing of this suit—December, 1880. These bonds recite the several statutes under which they were issued, and each bond also has a printed copy of these statutes on the back thereof. They were duly registered in the State Auditor's office, under an act entitled "An act to fund and provide for paying the railroad debt of counties, townships, cities and towns," in force April 16, 1869.

Each of these bonds also had the following indorsement upon it:

"STATE OF ILLINOIS, } *ss.*
Clay County. }

"I, Jno. L. Moore, clerk of the county court of Clay county, State of Illinois, do hereby certify that the county court of said county have entered an order on the records of said court directing me to indorse upon this bond the following words to-wit: 'all the conditions upon which this bond was to become a binding obligation upon the county of Clay, have been complied with.'

"In testimony whereof I have hereunto set my hand and seal of said court, at Louisville, this 4th day of January, A. D. 1871.

JNO. L. MOORE, *Clerk.*"

This indorsement, together with the statutes under which the donation bonds were issued, are set out in full in the record, on pages 21 to 23.

The court also finds as a fact, independent of this indorsement, that all the conditions upon which both the subscription and donation bonds were voted, had been fully complied with by the railroad company prior to their issue. The court also finds as a fact, that the defendant is an innocent holder of the bonds in suit, for full value, before maturity.

The undisputed facts being thus stated, it seems difficult to conceive of any valid defence to the bonds, and yet the plaintiff has filed a long brief, and quoted very many authorities, to show that the bonds are void. The ground chiefly relied upon by the plaintiff, as I understand, is, that the general railroad law of 1849, above mentioned, was repealed, by implication, in the passage of the act chartering the Illinois and Southeastern Railroad Company. The doctrine that statutes are repealed by implication is not favored by the courts, is so familiar to your Honors that the citation of authority is deemed unnecessary. The rule is well settled that where both statutes can stand together without conflict, the court will discountenance the repeal by implication. On a careful examination of the general railroad law of 1849, and the act chartering said railway company, and the act amendatory of said railway charter, approved February 24, 1869, it will be found that so far from the two latter acts repealing by implication the general railroad law of 1849, they expressly recognize and treat it as a law in force. We call attention to the very language of the act of February 24, 1869: "That when payment of subscriptions to the capital stock of said company, or payment for donation to said company, has been or shall be made by villages, cities,

counties or townships, * * * *under any act authorizing such subscriptions or donations to be made, all such bonds issued* or negotiated by the proper authorities, * * * and appearing regular on the face thereof, shall, in the hands of said company, or any other *bona fide* holder thereof, be deemed and taken, in all courts and elsewhere, as *prima facie* evidence of the regularity of everything required by the several acts in relation to the issuing of said bonds, or by any other act to be done preliminary to the issuing and negotiating of said bonds."

As a matter of fact, the two statutes relied upon by counsel as repealing, by implication, the railroad law of 1849, are merely statutes directing the terms upon which bonds should issue, and also conferring the power upon municipalities to aid the construction of said railroad by voting donations. There is no attempt whatever, in either of these statutes, to legislate on the subject of subscriptions to railroads. They refer entirely, so far as they grant additional powers, to the subject of donations, and not subscriptions, and the only particular in which they refer, by implication, to the general railroad law of 1849, is, to assert the legal effect to be given to bonds in the hands of innocent holders, issued under said act.

We are, therefore, unable to treat seriously the argument of plaintiff's counsel on the subject of repeal by implication, and we think all your Honors need do to affirm the judgment of the court below is to read the statutes above referred to. We do not dispute the fact that where the latter act *covers* the whole subject of the first, and it is apparent it was the intention to make it a substitute for the former, inconsistent provisions of the former will be repealed by implication. But what has this doctrine to do with the case at bar? We answer, nothing, because, as we have

already seen, the latter statutes, relied on for a repeal by implication in this case, were upon a different subject than the act of 1849 treats of. The latter act gave power to *subscribe*, and the acts chartering and amending the charter of the railroad company gave power to *donate*. The very act relied on to repeal the subscription law of 1849, as we have seen, expressly recognizes it as a law in full force,—not only this, but all other acts under which aid may have been voted to this company, for in speaking of the effect to be given bonds issued in aid of the company it says, "*under any act authorizing such subscriptions or donations.*"

Counsel argues, and quotes authority in support of the proposition, that counties have no power to issue railway aid bonds in the absence of a law expressly conferring the power, and this proposition we give our full assent to. But what has it to do with the case at bar? And counsel also insists, as to the subscription bonds, they are void because the *recitals* therein do not show a compliance with the railroad law of 1849, and because they do not mention the authority under which they were issued. It is true the subscription bonds do not recite just how the law was complied with in their issue. They do not recite an election, and all other preliminary steps usually required and taken in the issue of such securities. They do recite a fact, however, equivalent to all these steps, to-wit: they were issued "as authorized by virtue of the laws of the State of Illinois." But suppose they contained no recital whatever, this fact, unaided by proof showing compliance with the statute, would not render them void, because we have a right, independent of the recitals, to call the court's attention to any law authorizing their issue. The question as to what the bonds recite or fail to recite cannot arise in this case, for the reason that from the *findings* of the court below, *every act* required by

the law to authorize their issue had been *fully complied with*, and there is no pretense of non-compliance anywhere appearing in the record. Still farther, the act of incorporation above quoted expressly declares that bonds issued in aid of the road, and found in the hands of *innocent* purchasers, should be held by all courts to be "*prima facie*" *valid*. By the express terms of this statute the burden of proof of non-compliance with the law was shifted from the bondholder to the county, and the county having failed to show non-compliance with the statute, there is no force in the argument of counsel.

The county not only certified compliance with the "laws of the State of Illinois," but swore to the fact, in the act of procuring their registration under the funding law of 1869, above referred to. As this funding law was before the court in *Colomo* v. *Eaves*, 92 U. S. 487, and received a construction, I deem it unnecessary to quote it here. Your Honors held, in that case, when a municipality causes its bonds to be registered in the State Auditor's office, on the *affidavit* of its officers, the facts so stated are *conclusive*, and would estop the county from questioning them. But the county is effectually estopped from questioning the bonds in suit both by *laches*, payment of interest, and receiving the *stock* of the railroad company. The record shows that interest was paid on the subscription bonds from their issue, November, 1869, to December, 1880, and on the donation bonds from January, 1871, to December 1880. We invoke this doctrine, of course, upon the theory that the law authorized their issue in the first instance, and as to this authority neither the court below nor ourselves have any doubt.

This court has often held, in substance, that it is the duty of a county to use *diligence* in the matter of taking steps to declare its

bonds void, or voidable, and the reason is, that by delay, and payment of interest from year to year, additional currency and value are given thereto; and beside, it is the duty of the county to prevent its worthless securities from passing into the hands of innocent purchasers. This court has also expressly held that a county can not hold on to the benefits derived from the issue of its bonds, and at the same time contest their payment. In this case the county subscribed to the *stock* of the company, and so far as the record discloses, still holds the same, and for aught that appears, it is worth par. Beside all this, it is an uncontested fact that the railroad company fully complied with all the terms and conditions upon which the stock was subscribed and the aid bonds donated.

In the light of the foregoing facts, we insist that plaintiff has no standing in any court; that the judgment of the lower court was in accordance with the principles of the law as well as justice; and in short, that there is not an element on plaintiff's side of the case which should commend it to the favorable consideration of any court.

I have purposely omitted the quotation of authority in this brief, for the reason, I know your Honors are entirely familiar with every proposition contended for.

Respectfully submitted.

D. T. LITTLER,

Attorney for Defendant in Error.

14-592

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 172.

CHARLES J. BONAPARTE, EXECUTOR OF ELIZABETH PATTERSON, DECEASED, PLAINTIFF IN ERROR,

vs.

THE APPEAL TAX COURT OF BALTIMORE CITY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED APRIL 1, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 172.

CHARLES J. BONAPARTE, EXECUTOR OF ELIZABETH PATTERSON, DECEASED, PLAINTIFF IN ERROR,

vs.

THE APPEAL TAX COURT OF BALTIMORE CITY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

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1 MARYLAND, *ect.*

At a court of appeals of the State of Maryland, begun and held at the city of Annapolis on the first Monday of October, being the seventh day of the said month, A. D. one thousand eight hundred and seventy-eight.

Present, the Hon. James L. Bartol, chief judge; James A. Stewart, Richard H. Alvey, George Brent, Oliver Miller, Richard Grason, John M. Robinson, Richard I. Bowie, associate judges; James S. Franklin, clerk.

Were had, among other, the following proceedings, to wit:

2 THE APPEAL TAX COURT OF BALTIMORE City
vs.
ELIZABETH PATTERSON.

Be it remembered that now here, on the first Monday in April, being the first day of the said month, in the year of our Lord one thousand eight hundred and seventy-eight, the judge of the Baltimore City court, being in the eighth judicial circuit of Maryland, in pursuance of the directions of the act of assembly in such case made and provided, transmit to the court of appeals here the record of proceedings of a cause which was lately depending before him in the said Baltimore City court between Elizabeth Patterson, plaintiff, and the Appeal Tax Court
3 of Baltimore City, defendant, and wherein the said Baltimore City court passed an order in favor of the said Elizabeth Patterson against the said the Appeal Tax Court of Baltimore City, and from which said order the said The Appeal Tax Court of Baltimore City appealed to the court of appeals here, the tenor of which said record of proceedings is in form following, to wit:

4 *Petition of Elizabeth Patterson.—F'd. June* 23, '77.

In the Baltimore City court.

ELIZABETH PATTERSON
vs.
THE APPEAL TAX COURT OF BALTIMORE CITY. } Baltimore City court.

To the honorable Campbell W. Pinkney, associate judge of the supreme bench of Baltimore City, now sitting in the above court:

The petition of Elizabeth Patterson, a resident of the eleventh assessment district of the said city, respectfully showeth that by the return of the board of control and review, No. 3, of the said city, made to the said Appeal Tax Court within thirty days before the filing hereof, in accordance with the provisions of chapter 260 of the acts of assembly of 1876, there appears to have been valued to your petitioner, for the purposes of State and municipal taxation, the following property, that is to say:

Private securities	$ 10,000
City of New York stock, 6 per cent	105,100
City of New York stock, 7 per cent	15,000
County of New York stock, 7 per cent	10,000
County of New York stock, 6 per cent	50,000
State of New York stock, 6 per cent	30,000

State of Pennsylvania stock, 6 per cent	50,000
State of Ohio stock, 6 per cent	86,000
City of Philadelphia stock, 6 per cent	116,000

That your petitioner owns no private securities whatever, and is wholly ignorant as to the information which induced the said board of control and review to value to her the aforesaid $10,000 thereof, the same having been done without any notice to her.

That your petitioner owns three thousand dollars of the public debt of the State of New York, bearing six per cent. annual interest, but owns no more of the said debt or other State of New York stock, and consequently does not own $27,000 of the $30,000 of the said stock, so valued to her by the board of control and review aforesaid.

That the only State of Pennsylvania stock and State of Ohio stock owned by your petitioner are interests in the public debts of the said States of Pennsylvania and Ohio, which, as well as the above-mentioned three thousand dollars of the public debt of the State of New York, your petitioner claims to be exempted from valuation for the purposes aforesaid, the same being exempted from taxation in the States aforesaid by virtue of the laws under which they were contracted.

5 That the only city of New York stock and county of New York stock owned by your petitioner are interests in debts of public territorial corporations, existing by virtue of the laws of the State of New York, and constituting agencies of government therein, which said debts your petitioner claims to be exempted from valuation for the purposes aforesaid, the same being exempted from taxation of every kind by virtue of the laws of the State of New York authorizing the contracting thereof by the corporations aforesaid.

That your petitioner owns one hundred and sixteen thousand dollars of the debt of the city of Philadelphia, the said city being a municipal corporation existing by virtue of the laws of the State of Pennsylvania, and constituting an agency of government therein, but no more or other "city of Philadelphia stock." And your petitioner claims that of the $116,000 last aforesaid, $58,000 is exempted from valuation for the purposes aforesaid, for the reason (among others) that the same is exempted from taxation of every kind by virtue of the laws of the State of Pennsylvania, authorizing the same to be contracted by the municipal corporation aforesaid; and your petitioner further claims that the remaining $58,000 of the said $116,000 is exempted from valuation for the purposes aforesaid, for the reason (among others) that the same is taxed under the laws of the State of Pennsylvania, and that the tax thereon has been duly paid by your petitioner to the said State during all the time that she has owned the same.

That all the above exemptions claimed by your petitioner were by her set forth in her return to the assessors of the above-mentioned eleventh assessment district, in accordance with the provisions of sec. 18 of ch. 260 of the acts of assembly of 1876, and that your petitioner has fully complied with the requirements of the said act in the premises.

That, in fine, your petitioner claims all the above-mentioned property so valued to her by the said board to be either not owned by her or exempted from such valuation, and that the same should be stricken from the list of property valued to her by the said Appeal Tax Court.

To the end, therefore, that this honorable court may determine whether the above claims of your petitioner are just and well founded, and that she may have such relief in the premises as it may deem her

entitled to obtain, may it please your honor to issue a writ of summons to the said Appeal Tax Court of Baltimore City, directing them to take such action in the premises as is prescribed by sec. 28 of ch. 260 of the acts of assembly of 1876; and unless due cause to the contrary shall be by them shown, may it further please your honor to direct the said Appeal Tax Court to strike the said property from the list of property so valued as aforesaid to your petitioner, and otherwise, according to right.

And as in duty, &c.

I. NEVITT STEELE,
CHARLES J. BONAPARTE,
For Petitioner.

6 *Answer to petition filed under act of* 1876, *chap.* 260, *sect.* 28.—*F'd July* 18, '77.

In the Baltimore City court.

THE APPEAL TAX COURT OF BALTIMORE City
ats.
ELIZABETH PATTERSON.

To the honorable the judge of Baltimore City court:

The answer of the Appeal Tax Court of Baltimore City to the petition of Elizabeth Patterson exhibited against it in your honorable court.

The said Appeal Tax Court of Baltimore City admits that the property mentioned in the said petition has been valued and assessed, for the purposes of taxation, by the State of Maryland, to the said petitioner, as the owner thereof, as property within the assessment district wherein the same was so valued and assessed for the purposes aforesaid.

And the said Appeal Tax Court of Baltimore City avers that the said petitioner was the owner of the said property mentioned in the said petition, and so valued and assessed to the said petitioner for the purposes aforesaid, when the said property was so valued and assessed to the said petitioner for the said purposes of taxation by the said State of Maryland; and that the said property so valued and assessed to the said petitioner, as the owner thereof, for the purposes aforesaid, and each and every part thereof, was, when the said valuation and assessment were so made, subject to valuation and assessment for the purposes of taxation by this State, and ought to have been valued and assessed to the said petitioner, for the purposes of said taxation, in manner and form in which the same were so valued and assessed; and said property so valued and assessed, and each and every part thereof, now remains and is subject to valuation and assessment to the said petitioner for the purposes of taxation by this State.

Therefore, the said Appeal Tax Court of Baltimore City prays that it may be hence dismissed, with its reasonable costs in this behalf wrongfully incurred.

And as in duty, &c.

C. J. M. GWINN,
Attorney-General,
A. LEO KNOTT,
State's Attorney for Baltimore City,
Attorneys for the Appeal Tax Court of Baltimore City, Defendant.

Amendment to the petition.—F'd May 21, '78.

ELIZABETH PATTERSON
vs.
THE APP. TAX CT. OF BALTIMORE CITY.

The petitioner, by leave of the court first had and obtained, amends her petition by inserting therein the following clause:

7 That all the aforesaid stocks so owned by your petitioner are registered stocks, transferable only on the books of public officers of the States, as municipal corporations, whereby the same are issued, which books are kept only at the seats of government of the same, and whereof the interest is payable only at the aforesaid seats of government, and not elsewhere, excepting only the aforesaid State of Ohio stock, whereof the interest is, by a special law of the said State, made payable at the city of New York; nor can any of the said stocks be transferred to other ownership, nor profit of any kind derived therefrom, except by and through the doing of acts necessarily to be done outside of the State of Maryland.

Ordered by the court, this 21st day of May, 1878, that the petition be amended as prayed.

C. W. PINKNEY.

Agreement and order of court.—F'd June 26, '78.

Balto. City c't.

ELIZABETH PATTERSON
vs.
THE APPEAL TAX COURT.

It is agreed in this case that a pro-forma order in favor of the petitioner, and directing the property prayed to be stricken from the list to be so stricken, shall be passed by the court, and that copies of the bonds, certificates of stock, as evidences of debt referred to in said petition, together with any affidavits that may be filed in proof of the facts stated therein, be included in the record of this case, and that an appeal from such order shall be taken by the said Appeal Tax Court to the court of appeals, with the right to either party to read in the said court from the printed statute books the laws relating to such stocks and bonds in the States of their issue.

C. J. M. GWINN, *Att'y Gen.*,
A. LEO. KNOTT,
State's Att'y,
For App. Tax C't.
I. NEVITT STEELE,
CHARLES J. BONAPARTE,
For Petitioner.

In the Baltimore City court, May term, 1878.

In accordance with the agreement of counsel filed in this case, it is ordered by the court, this twenty-sixth day of June, 1878, that the property assessed and valued to Elizabeth Patterson—

Description of the property.

Private securities	$10,000
City of New York stock, 6 per cent	105,100
City of New York stock, 7 per cent	15,000
County of New York stock, 7 per cent	10,000
County of New York stock, 6 per cent	50,000
State of New York stock, 6 per cent	30,000
State of Pennsylvania stock, 6 per cent	50,000
State of Ohio stock, 6 per cent	86,000
City of Philadelphia stock, 6 per cent	116,000

8 is not subject to taxation; and the Appeal Tax Court of Baltimore City is hereby ordered and directed to strike the said property from the list of property valued to such owner.

C. W. PINKNEY,
Associate Judge of the Supreme Bench of Baltimore City, assigned to and presiding over the Baltimore City Court.

Affidavit.—F'd July 1st, 1878.

In the Baltimore City court.

ELIZABETH PATTERSON
vs.
THE APPEAL TAX COURT.

STATE OF MARYLAND,
City of Baltimore, to wit:

I hereby certify that on this first day of July, A. D. 1878, personally appeared before the subscriber, a justice of the peace of the said State in and for the city aforesaid, Elizabeth Patterson, the petitioner in the above-entitled suit, and made oath upon the Holy Evangely of Almighty God that she did not own at the time of the filing of her petition therein, or of the making of the assessment thereby complained of, or previously thereto, any private securities whatsoever, nor has she owned any since, nor does she own any now; and, further, that she did not own any more "State of New York stock" than the $3,000 thereof admitted to be hers in the said petition at the dates aforesaid, nor has she acquired any more since, nor does she own any more now; and, further, that she has always, since she owned the $58,000 of city of Philadelphia stock alleged in the said petition to be taxed by the State of Pennsylvania, paid as tax thereon the annual sum of $174, the same being deducted and with'eld when the interest thereupon is and has been annually paid to her.

GEO. MCCAFFRAY, *J. P.*

Notice of appeal.—F'd July 13, '78.

In Baltimore City court, May term, 1878.

ELIZABETH PATTERSON
vs.
THE APPEAL TAX COURT OF BALTIMORE CITY.

N. C. Robertson, clerk of Baltimore City court:
Enter an appeal in this case, on the part of the Appeal Tax Court of

Baltimore City, from the order and determination of the court in the above case.

C. J. M. GWINN,
Attorney-General,
A. LEO KNOTT,
State's Attorney for Baltimore City,
Attorneys for the Appeal Tax Court of Baltimore City.

9 *Agreement of counsel.—F'd Aug't 30, '78.*

THE APPEAL TAX COURT
vs.
ELIZABETH PATTERSON.

It is agreed that the $50,000 of State of Pennsylvania 6 % stock mentioned in the petition is evidenced by certificates of the forms No. 1, hereto appended.

And that the $86,000 of State of Ohio 6 % stock is evidenced as to $76,000 by certificates of the form No. 2, and as to $10,000 by certificates of the form No. 3.

And that the $116,000 of city of Philadelphia 6 % stock is evidenced as to $58,000 by certificates of form No. 4; as to $11,000, of form No. 5; as to $4,000, of form No. 6; and as to $43,000, of form No. 7.

And that the $50,000 of New York County 6 % stock is evidenced by certificates of form No. 8.

And that the $15,000 of New York City 7 % stock is evidenced by certificates of form No. 9.

And that of the $105,100 of city of New York 6 % stock, $14,100 is evidenced by certificates of form No. 10; $35,700, of form No. 11; $2,000, of form No. 12; $26,600, of form No. 13; $500, of form No. 14 *No.* 14 *;* $5,700, of form No. 15; and $6,500, of form No. 16.

And that the certificates for the remaining $14,000 of New York City 6 % stock, and the $3,000 of New York State 6 % stock, could not be produced, for the reason that the said stocks had been redeemed, and the certificates therefor surrendered by this petitioner, pending the proceedings in this cause.

June 26th, 1878.

C. J. M. GWINN,
Att'y Gen'l.
A. LEO KNOTT,
State Att'y for Balto. City.
I. NEVITT STEELE,
CHARLES J. BONAPARTE,
For Appellee.

Certificates of stock.—F'd Aug. 30, '78.

No. 1.

UNITED STATES OF AMERICA, 6 PER CENT. LOAN, UNDER ACT OF FEBRUARY 2ND, 1867.

Redeemable after fifteen and payable twenty-five years from Feb. 1st, 1867.

COMMONWEALTH OF PENNSYLVANIA.

Number .] [dollars.

This certifies that there is due from the Commonwealth of Pennsylvania unto Mrs. Elizabeth Patterson, or assigns, the sum of five hundred dollars, redeemable at the pleasure of the Commonwealth after the 1st day of February, 1882, and payable on the 1st day of February, 1892, with interest at six per cent. per annum from the 10 1st day of February, 1867, inclusive, payable at the Farmers' and Mechanics' National Bank of Philadelphia, on the 1st day of February and August in each year. [15–25.]

This loan is authorized by act of assembly entitled "An act to create a loan for the redemption of the overdue loans of the Commonwealth," approved February 2nd, 1867; is exempt from State, municipal, and local taxation in Pennsylvania; is recorded in the Farmers' and Mechanics' National Bank of Philadelphia, and is transferable on the books of the said bank, by the owner or owners of the loan, his, her, or their attorney, according to the rules and forms prescribed for that purpose.

The Farmers' and Mechanics' National Bank, Philadelphia, May 16th, 1867.

C. M. LEWIS,
President.

Countersigned:

F. D. SHERMAN, [SEAL.]
Ass't Cashier.
H. STROUF,
Transfer Officer.

No. 2.

No. .] 1881. [$.

FUNDED DEBT OF THE STATE OF OHIO.

COLUMBUS, OHIO, *January 29th*, 1867.

Be it known that the State of Ohio owes to Madame Elizabeth Patterson, or her assigns, the sum of two thousand dollars, bearing interest from the first day of January, 1867, inclusively, at the rate of six per centum per annum, payable half yearly, on the first days of January and July, in the city of New York, the principal of which is reimbursable in the city of New York, at the pleasure of the State, after the 30th day of June, 1881, being stock created in pursuance of an act of the general assumbly, passed March 28th, 1862, to fund the public debt,

redeemable at the pleasure of the State after the thirty-first day of December, 1860, which debt is recorded in this office, and is transferable, only by appearance in person or by attorney, according to law, upon the books of the commissioners of the sinking fund.

In testimony whereof this certificate hath been signed at the office of the board of commissioners of the sinking fund, at Columbus aforesaid, by the president thereof, countersigned by the secretary of state, who hath also registered and certified the same and affixed the great seal of the State hereto, and hath been certified to be valid and in due form by the attorney-general of the State.

[SEAL.]

JAS. H. GODMAN,
Auditor of State and President.

Countersigned and registered:
WM. HENRY SMITH,
Secretary of State.

Provisions of the constitution of Ohio, adopted A. D. 1851, art. 8, sec. 7: The faith of the State being pledged for the payment of its public debt, in order to provide therefor there shall be created a sinking fund which shall be sufficient to pay the accruing interest on such debt and annually to reduce the principal thereof by a sum not less than one hundred thousand dollars, increased yearly, and each and
11 every year, by compounding at the rate of six per cent. per annum.

Art. 8, sec. 8: The auditor of state, secretary of state, and attorney-general are hereby created a board of commissioners to be styled the "commissioners of the sinking fund."

OFFICE OF THE ATTORNEY-GENERAL,
Columbus, Ohio, January 29, 1867.

It is hereby certified that this obligation is in the form of law and valid.

W. HINST,
Attorney-General.

No. 3.

No. .] 1886. [$.

STATE OF OHIO CANAL STOCK.

OFFICE OF THE COMMISSIONERS OF THE SINKING FUND,
Columbus, Ohio, Sept. 16th, 1875.

Be it known that the State of Ohio owes to Madame Elizabeth Patterson, of Baltimore, Md., or her assigns, the sum of one thousand dollars, bearing interest from the first day of July, 1875, inclusively, at the rate of six per centum per annum, payable half yearly, on the first days of January and July, in the city of New York, being stock created in pursuance of an act of the general assembly of the State of Ohio passed 8th April, 1856, the principal of which is reimbursable in the city of New York, at the pleasure of the State, after the thirty-first day of December, 1886, which debt is recorded in this office, and is transferable, only by appearance in person or by attorney, according to law, upon the books of the commissioners of the sinking fund.

In testimony whereof this certificate hath been signed, at the office of

the board of the commissioners of the sinking fund, in Columbus aforesaid, by the president thereof, countersigned by the secretary of state, who hath also registered and certified the same and affixed the great seal of the State hereto, and hath been certified to be valid and in due form by the attorney-general of the State.

[SEAL.]

JAS. WILLIAMS,
Auditor of State and President.

Countersigned and registered:
WM. BELL, JR.,
Secretary of State.

Provisions of the constitution of Ohio, adopted A. D. 1851, art. 7: The faith of the State being pledged for the payment of its public debt, in order to provide therefor there shall be created a sinking fund which shall be sufficient to pay the accruing interest on such debts and annually to reduce the principal thereof by a sum not less than one hundred thousand dollars, increased yearly, and each and every year, by compounding at the rate of six per cent. per annum. Art. 8: The auditor of state, secretary of state, and attorney-general are hereby created a board of commissioners to be styled the "commissioners of the sinking fund."

OFFICE OF THE ATTORNEY-GENERAL,
Columbus, Ohio, Sept. 16th, 1875.

It is hereby certified that this obligation is in due form of law and valid.

JOHN LITTLE,
Attorney-General.

12 No. 4.

Loan of $700,000.]

UNITED STATES OF AMERICA.

Six per cent. loan, payable free from all taxes.

LOAN OF THE CITY OF PHILADELPHIA.

Certificate No. —.

Authorized by ordinance of December 10th, 1859.

This certifies that there is due to Madame Elizabeth Patterson, of Baltimore, by the city of Philadelphia, six thousand dollars, with interest at the rate of six per centum per annum, payable half yearly, on the first days of January and July; the principal, not reimburseable, without the consent of the owner hereof, before the first day of January, 1890, and will be paid on that day. This certificate shall be transferable at the office of the city treasurer, by the owner in person or by attorney, upon the surrender hereof to the treasurer.

In witness whereof the treasurer of said city has hereunto set his hand, and caused the seal of the city of Philadelphia to be hereunto

annexed, the twenty-sixth day of January, 1860, and the controller has attested the same on the same day and year.

[SEAL.] BENJ. H. BROWN,
City Treasurer.

GEORGE W. HUFTY,
City Controller.

Registered ordinance, approved May 9th, 1868.

[SEAL.] G. E. SANGSTON,
Notary Public.

No. 5.

CORPORATION OF THE CITY OF PHILADELPHIA.

Six per cent loan, under an ordinance of councils of February 20, 1851.

Certificate No. , for four thousand dollars.

These presents do certify that there is due from the mayor, aldermen, and citizens of Philadelphia the sum of four thousand dollars, payable to Madame Elizabeth Patterson, of Baltimore, or assigns, bearing interest at six per centum per annum, payable on the first days of January and July.

This certificate is issued in pursuance of an ordinance of the select and common councils of the city of Philadelphia, passed on the 20th day of February, in the year of our Lord eighteen hundred and fifty-one, entitled "An ordinance to authorize a subscription on the part of the city to the capital stock of the Pennsylvania Railroad Company, and to provide for the payment of the instalments thereon," and of a supplement thereto, passed the ninth day of February, in the year of our Lord eighteen hundred and fifty-two; is not redeemable, without the consent of the owner thereof, previous to the first day of July, eighteen hundred and ninety, and can only be transferred at the office of the city treasurer, in the same manner as the certificates of the funded debt of the city.

13 In testimony whereof, and by virtue of the authority vested in me by the aforesaid ordinance, I, the mayor of the city of Philadelphia, have hereunto set my hand, this twenty-second day of May, in the year of our Lord one thousand eight hundred and fifty-four.

[SEAL.] CHARLES GILPIN, *Mayor.*

Registered ordinance, approved May 9th, 1868.

G. E. SANGSTON,
Notary Public.

Attest:
JOHN LINDSAY,
Treasurer.

No. 6.

[Certificate .] [No. .]

Six per cent. loan of the city of Philadelphia, for the use of the trustees of the gas works. Issued under authority of an ordinance of the city of Philadelphia, approved July 13th, 1855, entitled "An ordinance to authorize a loan for the use of the trustees of the Philadelphia gas works."

This certifies that there is due to Madame Elizabeth Patterson, of

Baltimore, by the city of Philadelphia, four thousand dollars, with interest at the rate of six per centum per annum, payable half yearly, on the first day of January and July, at the office of the city treasurer, in the city of Philadelphia; the principal to be paid, at the said office, on the first day of July, anno Domini eighteen hundred and eighty-five, and not before without the consent of the owner thereof.

In witness whereof the treasurer of the said city has hereunto set his hand and caused the seal of the city of Philadelphia to be affixed, the eighth day of October, A. D. one thousand eight hundred and fifty-five, and the comptroller has attested the same on the said day and year.

[SEAL.] F. KNOX MORTON, *Treasurer.*

Attest:

JOHN N. HENDERSON,
Controller.

Registered ordinance, approved May 9th, 1868.

[SEAL.] G. E. SANGSTON,
Notary Public.

No. 7.

UNITED STATES OF AMERICA, CITY OF PHILADELPHIA, STATE OF PENNSYLVANIA.

Loan of the city of Philadelphia.

Certificate No. .] [Six per cent. loan.

This certifies that there is due to Madame Elizabeth Patterson, of Balto., by the city of Philadelphia, two thousand dollars, with interest at the rate of six per centum per annum, payable half yearly, on the first days of January and July; the principal not reimburseable, without the consent of the owner hereof, before the first day of January, 1884.

This certificate shall be transferable at the office of the city treasurer, by the owner in person or by attorney, upon the surrender thereof to the treasurer.

14 In witness whereof the treasurer of the said city has hereunto set his hand and caused the seal of the city of Philadelphia to be hereunto annexed, the fourteenth day of November, 1854, and the controller has attested the same on the same day and year.

[SEAL.] JOHN LINDSAY,
City Treasurer.

Attest:

JOHN N. HENDERSON,
City Controller.

Registered ordinance, approved May 9th, 1868.

[SEAL.] G. E. SANGSTON,
Notary Public.

No. 8.

(Authorized by an act of the legislature of the State of New York passed February 8th, 1864, and by an ordinance of the board of supervisors approved March 18th, 1864.)

No. .] *Soldier's bounty-fund bond.* [$

Know all men by these presents that the county of New York is held

and firmly bound to Madame Elizabeth Patterson, or her assigns, in the sum of twenty thousand dollars, lawful money of the United States of America, bearing interest at the rate of six per cent. per annum, payable half yearly, on the first day of May and November in each year, and the principal sum payable on the first day of November, in the year one thousand eight hundred and ninety.

This bond is transferable, at the pleasure of the holder, either in person or by attorney, only upon the books of the county, at the office of the comptroller, such transfer to be endorsed hereon by the stock and bond clerk.

In witness whereof the board of supervisors of said county have caused this bond to be signed by the comptroller, countersigned by the mayor, and sealed with the common seal of said board, attested by their clerk, at New York, this 20th day of April, A. D. 1864.

[SEAL.] MATTHEW W. BRENNAN,
Comptroller.

Countersigned by—
C. C. GUNTHER, *Mayor.*

Attest:
J. B. YOUNG,
Clerk of the Board of Supervisors.

No. 9.

Number .] 1887. [dollars.

New York City seven per cent. bond.

Series No. 4.

Accumulated debt bond of the corporation of the city of New York.

(By authority of an act of the legislature of the State of New York passed May 12th, 1869, chap. 876.)

Know all men by these presents that the mayor, aldermen, and commonalty of the city of New York are held and firmly bound unto
15 Madame Elizabeth Patterson, of Baltimore, Md., or her assigns, in the sum of five thousand dollars, lawful money of the United States of America, payable at the office of the comptroller of said city, on the first day of November, in the year one thousand eight hundred and eighty-seven, with interest at the rate of seven per centum per annum, payable semi-annually, on the first day of May and November in each year.

This bond is issued by virtue of an act of the legislature of the State of New York (chap. 876) passed May 12th, 1869, and is transferable, at the pleasure of the holder, either in person or by attorney, only on the books of the corporation, at the office of the comptroller, and the surrender of this bond.

Dated New York, this 14th day of June, in the year one thousand eight hundred and seventy.

RICHARD B. CONNOLLY,
Comptroller.

Countersigned by—
A. OAKEY HALL, *Mayor.*

Attest:
[SEAL.] JOHN HARDY,
Clerk of Common Council.

No. 10.

No. .] Redeemable in 1878. [$.

The floating-debt fund stock of the city of New York.

(Authorized by an act of the legislature of the State of New York, chap. 408, passed April 14th, 1860, for the purpose of liquidating and funding the floating debt of the corporation of the city of New York.)

Be it known that there is due from the mayor, aldermen, and commonalty of the city of New York unto Madame Elizabeth Patterson, of Baltimore, Md., or her assigns, the sum of two thousand five hundred dollars of the floating-debt fund stock of the city of New York, bearing interest at the rate of six per cent. per annum, payable quarter-yearly, on the first days of February, May, August, and November in each year; and the principal sum payable on the first day of May, in the year one thousand eight hundred and seventy-eight.

The stock represented hereby is transferable, at the pleasure of the holder, either in person or by attorney, upon the books of the corporation, at the office of the comptroller, and the surrender of this certificate.

New York, Nov. 11th, 1868.

RICHARD B. CONNELLY,
Comptroller.

Countersigned by—
JOHN T. HOFFMAN, *Mayor.*

No. 11.

No. .] Shares. [$.

The Central Park improvement-fund stock of the city of New York.

Payable in 1887.

NEW YORK, *Feb. 1st*, 1861.

Be it known that there is due from the mayor, aldermen, and commonalty of the city of New York unto Madame Elizabeth Patterson, of Baltimore, or her assigns, the sum of two hundred dollars
16 of the Central Park improvement-fund stock of the city of New York, bearing interest at six per cent. per annum, from the 1st day of February, 1861, inclusively, payable quarter-yearly; and the principal sum payable on the first day of August, one thousand eight hundred and eighty-seven.

This stock is created by virtue of an act of the legislature of the State of New York entitled "An act for the regulation and government of the Central Park, in the city of New York," passed April 17th, 1857, and by an ordinance of the corporation passed November 9th, 1857, and by a further ordinance of the corporation passed June 24th, 1858; which stock is recorded in the office of the comptroller, and is transferable only, by appearance in person or by attorney, at said office, and by return of this certificate, according to the rules and forms instituted tor that purpose.

ROB'T HANLY,
Controller.

Countersigned:
FERNANDO WOOD, *Mayor.*

No. 12.

Number .] [Redeemable in 1883.

$1,000.] *The Croton water stock of the city of New York.*

(Authorized by an act of the legislature of the State of New York, chap. 372, passed April 14th, 1860, for the purpose of increasing the supply of Croton water, and extending the necessary works for accumulating and distributing the same in the city of New York.)

Be it known that there is due from the mayor, aldermen, and commonalty of the city of New York unto Madame Elizabeth Patterson, of Baltimore, Md., or her assigns, the sum of one thousand dollars of the Croton water stock of the city of New York, bearing interest at the rate of six per cent. per annum, payable quarter-yearly, on the first day of February, May, August, and November in each year; and the principal sum redeemable on the first day of November, in the year one thousand eight hundred and eighty-three.

Stock represented hereby is transferable, at the pleasure of the holder, either in person or by attorney, only upon the books of the corporation, at the office of the comptroller, and the surrender of this certificate.

New York, November 18th, 1868.

RICHARD B. CONNOLLY,
Comptroller.

Countersigned by—
JOHN T. HOFFMAN, *Mayor.*

No. 13.

The Central Park fund stock of the city of New York.

No. .] [Payable in 1887.

15 shares.] [$1,500.

NEW YORK, *August 23rd*, 1858.

Be it known that there is due from the mayor, aldermen, and commonalty of the city of New York unto Madame Elizabeth Patterson, of Baltimore, or her assigns, the sum of one thousand five
17 hundred dollars of the Central Park fund stock of the city of New York, of the year one thousand eight hundred and fifty-five, bearing interest at six per cent. per annum from the 1st day of August, 1858, inclusively, payable quarter-yearly; and the principal sum payable on the first day of July, one thousand eight hundred and eighty-seven.

This stock is created by virtue of an act of the legislature of the State of New York entitled "An act to alter the map of the city of New York, by laying out thereon a public place, and to authorize the taking of the same," passed July 21st, 1853, and amended February 13th, 1857, and by an ordinance of the corporation passed February 29th, 1856; which stock is recorded in the office of the comptroller, and is transferable only, by appearance in person or by attorney, at said office, and by return of this certificate, according to the rules and forms instituted for that purpose.

A. C. FLEEGY,
Comptroller.

Countersigned:
JOHN CLANCY,
Acting Mayor.

No. 14.

No. .] [$.

The Central Park fund stock of the city of New York.

NEW YORK, *December 11th*, 1875.

Be it known that there is due from the mayor, aldermen, and commonalty of the city of New York unto Madame Elizabeth Patterson, of Baltimore, Md., or her assigns, the sum of five hundred dollars of the Central Park fund stock of 1887, authorized by act of the legislature of the State of New York passed July 21st, 1853 (chap. 616), and amended February 13th, 1857 (chap. 25), bearing interest at the rate of six per cent. per annum, payable quarter-yearly, on the first day of February, May, August, and November in each year; and the principal sum redeemable on the first day of November, one thousand eight hundred and eighty-seven.

The stock represented hereby is transferable, at the pleasure of the holder, either in person or by attorney, only upon the books of the comptroller, and the surrender of this certificate.

J. M. McCOY,
Comptroller.

Countersigned by—
W. H. WICKHAM, *Mayor.*

No. 15.

No. .] [$.

The Central Park improvement-fund-stock of 1887 *of the corporation of the city of New York.*

(Authorized by acts of the legislature of the State of New York, chapter 771, passed April 17th, 1857, and chapter 349, passed April 9th, 1859, for the regulation and improvement of the Central Park.)

Be it known that there is due from the mayor, aldermen, and commonalty of the city of New York unto Madame Elizabeth Patterson, or her assigns, the sum of one thousand dollars of the Central Park improvement-fund stock of 1887, bearing interest at the rate of six per cent. per annum, payable quarter-yearly, on the first day of February, May, August, and November in each year, and the
18 principal sum redeemable on the first day of August, one thousand eight hundred and eighty-seven.

The stock represented hereby is transferable, at the pleasure of the holder, either in person or by attorney, only upon the books of the corporation, at the office of the comptroller, and the surrender of this certificate.

New York, February 1st, 1866.

MATTHEW W. BRENNEN,
Comptroller.

Countersigned by—
JOHN T. HOFFMAN, *Mayor.*

No. 16.

CONSOLIDATED STOCK OF THE CITY OF NEW YORK.

Assessment bond of the corporation of the city of New York.

No. 14.] [$1,500.

For payment of expenses incurred or to be incurred on account of regulating and paving streets, building sewers, and all other works ordered to be done by contract, under and by virtue of ordinances of the common council, the expense whereof is to be afterwards collected by assessment from the property benefitted by said work or works.

Know all men by these presents that the mayor, aldermen, and commonalty of the city of New York are held and firmly bound unto Madame Elizabeth Patterson, of Baltimore, Md., or her assigns, in the sum of one thousand five hundred dollars, lawful money of the United States of America, payable at the office of the comptroller of said city, on the first day of November, in the year of our Lord one thousand eight hundred and eighty, with interest at the rate of six per centum per annum, payable semi-annually, on the first day of May and November in each year.

This bond is one of a series of the like tenor issued and to be issued in pursuance of an act of the legislature of the State of New York (chap. 397) passed April 16th, 1852; sec. 4, chap. 580, laws of 1872, passed May 7th, 1872; and sec. 3, of chap. 750, passed June 13, 1873, and is transferable, at the pleasure of the holder, only upon the books of the corporation, at the office of the comptroller of the said city, either in person or by attorney, such transfer to be endorsed hereon by the stock clerk.

In witness whereof the said the mayor, aldermen, and commonalty of the city of New York have caused their corporate seal to be hereto affixed, and these presents to be subscribed in their behalf by the comptroller and countersigned by the mayor of said city, this 16th day of November, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] J. MCCOY,
Comptroller.

Attest:
F. I. TWOMEY,
Clerk of Common Council.

Countersigned by—
W. H. WICKHAM, *Mayor.*

19 *Docket entries.*

In the Baltimore City court, May term, 1878.

ELIZABETH PATTERSON
vs.
THE APPEAL TAX COURT OF BALTIMORE CITY.

June 23d, 1877.—Petition filed; service of copy admitted.
July 18th, 1877.—Answer to the petition filed.
May 21st, 1878.—By leave of the court, petition amended and amendment thereto filed.

June 26th, 1878.—Agreement of counsel filed that a pro-forma order shall be passed by the court in favor of the petitioner.

June 26th, 1878.—Order of court filed that the property assessed to the petitioner be stricken from the tax-list.

July 1st, 1878.—Affidavit of the petitioner filed.

July 13th, 1878.—Defendant's prayer of appeal to court of appeals filed.

August 30th, 1878.—Agreement of counsel and (16) certificates of stock, &c., filed.

August 31st, 1878.—Original papers transmitted to the court of appeals of Maryland, in accordance with the prayer of appeal of the defendant and the act of assembly of 1876, chap. 260, sec. 30.

STATE OF MARYLAND,
Baltimore City, set.:

I hereby certify that the aforegoing is a true short copy of the docket entries in the above-entitled cause, taken from the record of proceedings of the Baltimore City court.

In testimony whereof I hereto set my hand and affix the seal of the said court, this 31st day of August, 1878.

[SEAL'S PLACE.] N. C. ROBERTSON,
Clerk of the Baltimore City Court.

20 And now come into the court of appeals here as well the said The Appeal Tax Court of Baltimore City by C. T. M. Gwinn, attorney-general of Maryland, and A. Lee Knott, esq., State's attorney of Baltimore City, as the said Elizabeth Patterson, by C. T. Bonaparte, esq., and I. N. Steele, esq., her attorneys, and thereupon, on motion of the said Elizabeth Patterson, by her attorneys aforesaid, it is ruled by the court here that the said The Appeal Tax Court of Baltimore City assign the errors in the record of proceedings aforesaid, or in the passing of the order aforesaid, so as aforesaid brought before the court of appeals here, for correcting the errors supposed to be therein, or
21 judgment by the court of appeals here will be entered against it in default thereof. And the said The Appeal Tax Court of Baltimore City, by its attorneys aforesaid, says that in the record of proceedings aforesaid, and also in the passing of the order aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that the order aforesaid, in the plea aforesaid given was given for the said Elizabeth Patterson against the said The Appeal Tax Court of Baltimore City, when, by the law of the land, that order ought to have been given for the said The Appeal Tax Court of Baltimore City against the said Elizabeth Patterson; therefore, in that there is manifest error, and it prays that the order aforesaid, for that error and others being in
22 the record of proceedings aforesaid, may be reversed, annulled, and held entirely as void, and that it, the said The Appeal Tax Court of Baltimore City may be restored to all things which it hath lost by occasion of the said order, and that the said Elizabeth Patterson may rejoin to the errors aforesaid, and so forth. And thereupon it is ruled by the court of appeals here that the said Elizabeth Patterson join in the errors by the said The Appeal Tax Court of Baltimore City above assigned in the record of proceedings aforesaid, or judgment by the court of appeals here will be rendered against her in default thereof. And the said Elizabeth Patterson, by her attorneys aforesaid, says there is is no error in the record of proceedings aforesaid, nor in the giving

23 of the order aforesaid, and she prays that the court of appeals here will proceed to the examination as well of the record of proceedings aforesaid as of the matters aforesaid, by the said The Appeal Tax Court of Baltimore City above for error assigned, and that the said order may be in all things affirmed, and so forth. Thereupon further process of and upon the premises, between the parties aforesaid is, by virtue of an act of assembly in such cases made and provided, continued before the court of appeals here until the first Monday in October next. The same day is given to the said parties there, then to hear the judgment of the court of appeals here of and upon the said premises, and so forth.

24 And now at this day, to wit, the said first Monday in October, being the seventh day of the said month, in the year of our Lord one thousand eight hundred and seventy-eight, come again into the court of appeals here the parties aforesaid, by their attorneys aforesaid. Whereupon as well the record and proceedings aforesaid and the order given in form aforesaid, as the matters aforesaid by the said The Appeal Tax Court of Baltimore City above for error assigned, being seen, and by the court of appeals here fully understood, and mature deliberation thereupon had, for that it appears here that there is error in the record of proceedings aforesaid, and also in the giving of the or-

25 der aforesaid: Therefore it is considered by the court of appeals here that the order aforesaid, given in form aforesaid, be reversed, with costs, except as to the sum of ten thousand dollars private securities admitted at the argument to be improperly assessed; and the record is hereby remanded.

Thereupon on the 31st day of January, 1879, the court of appeals of Maryland filed the opinion and decree in the words following, to wit:

APPEAL TAX COURT OF BALTIMORE CITY,
vs.
ELIZABETH PATTERSON.

BOWIE, Judge:

26 The principal question raised by the records in the class of appeals now before us is, whether the public debt of one State, owned by a citizen or resident of another, is taxable by the State in which the owner resides.

The importance of the question, in a financial point of view, to the State and its residents can scarcely be magnified.

Although the counsel for the parties interested have exhibited the greatest industry and research in presenting every case that could throw light on the subject, it appears the question is yet "res integra."

Analagous cases, but none directly in point have been cited.

27 In some the question has been adverted to, but avoided as not raised by the record. There seems to have been a manifest reluctance to anticipate a question so difficult of solution.

The power of taxation (it is said) is limited only by its necessities or such constitutional bounds as are imposed by the compact of government.

It is conceded on all hands to be a legislative power with the wisdom or policy of which the judicial authority has nothing to do. It operates upon all tangible property real or personal, found within the territory in which the owner resides, and all intangible property, which follows the person of the owner.

The inquiry in the present instance is, how far it may be exer-
28 cised upon stocks, bonds, or other certificates of public debt issued by other sovereign States (or municipalities created by them) which are exempted by the States issuing them, and owned by citizens of this State.

The most recent text writers, announcing the result of the latest decisions on this subject, declare that protection of the government being the consideration for which taxes are demanded, all parties who receive or are entitled to that protection may be called upon to render the equivalent. The protection may be either to the rights of persons or to the rights in property, and taxes may consequently be imposed
29 when either person or property is within the jurisdiction. But a personal tax cannot be assessed against a non-resident, neither can the property of a non-resident be taxed, unless it has an actual situs within the State, so as to be under the protection of its laws. The mere right of a foreign creditor to receive from his debter within the State the payment of his demand cannot be subjected to taxation.

It is a right that is personal to the creditor where he resides, and the residence or place of business of his debtor is immaterial.

The power of taxation, however vast in its character, and
30 searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. (Cooley on Taxation, pp. 14, 15; 15 Wall., 300, 319; 11 Allen, 265.) In a subsequent chapter, treating of limitations upon the taxing power, the learned writer referring to the above as established propositions, says:

"It has already been shown that persons and property not within the territorial limits of the State cannot be taxed. In such a case, the State affords no protection, and there is nothing for which taxation can be an equivalent, but where a person is resident within the State, his personal property in contemplation of law accompanies him, and he
31 may be required to pay taxes upon it wherever it is situated, while the real estate of the non-resident is always taxable where it is." It is competent also for any State to provide that tangible personal property situated within it may be taxed there."

The 15th article of our declaration of rights announcing the principles upon which the levying of taxes should be based, is apparently a modification of one of the four maxims with regard to taxes in general laid down by Adam Smith, in his work on the nature and causes of the wealth of nations, (part 2d, tit. Taxes; vol. 4, p. 164.

That distinguished author's first maxim is: "The subjects of
32 every State ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State."

The language of our organic law is: "That every person in the State or holding property therein, ought to contribute his proportion of public taxes for the support of government, according to his actual worth in real or personal property." Decla. of rights, art 15.

No reference is expressly made to the situs of the property as the ground of obligation where the tax is laid on the person; the
33 elements of the duty are the ability of the citizen to pay, and the protection he enjoys under the government.

By the universal law of all civilized nations, property in action, had its habitat at the domicil of the owner; it could not exist separately

from the owner, as an obligation or duty owing to him, it must follow his person.

The State which protected him, or of which he was a citizen, must eventually protect his right to such claims, if the right was assailed or denied.

The early decisions of this State announced two apparently conflicting propositions on the subject of the power to tax choses in
34 action. In the tax cases 12 G. & T. 117, it is held that, "Non-residents of the State are liable to the tax in respect of stock held in the banks of this State, as well as residents here." 2dly, that a mortgage in the hands of the mortgagee is liable to be taxed as an item of his property, etc., at the domicil of the creditor.

The first seeming to lay the tax on the debtor institution; the second laying the tax on the creditor.

The principal on which the first proposition rests must be that the banks, being incorporated by the State, it is competent for the State to impose a tax upon its stock wherever and by whomsoever
35 held, because the corporation is the creation of the State, and exists by its permission.

No opinion was filed in the cases just cited, but in 3 Gill., 14, Howell vs. The State, this court entered into the theory of taxation, declaring it was an instance of sovereignty and co-extensive with that to which it is incident. It said: "All subjects over which the sovereign power of the State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. "The sovereignty of a State extends to everything which exists by its authority, or is introduced by its permission, but it does not extend to those means which are employed by Congress to carry
36 into execution powers conferred on that body by the people of the United States."

"The power of taxation extends to all the people of the government, and embraces everything which may be fairly considered as constituting a part of the mass of the property of the State."

These propositions, which have since become axioms, were, it is believed, the result of very elaborate discussions as to the extent of the power of taxation granted to the general government by the Federal Constitution, and were laid down by the Supreme Court of the United States from time to time, as the power of the States and the Federal Government were brought in question; vide McCullough vs. The State of Md., 4 Wharton 316. The principles on which they are
37 founded are derived mainly from the law of nations, as applied to the anomalous relation of the States to the United States.

They have been adopted and recognized since as elementary law, in all the text-books on taxation, and are regarded by the courts as safe guides in all questions of jurisdiction, between the several States.

This court recognized and reaffirmed the principles which govern the imposition of taxes on debts or securities within the State, in the case of Latrobe trustee vs. the Mayor, etc., 19 Md. Rep., p. 18. The subject of taxation was a mortgage or mortgages on real estate lying in the city of Baltimore, to secure debts due to the appellant as trustee.
38 The appellant resided in Howard County, the cestui que trusts in Baltimore City.

The appellee assessed the mortgages in the city according to the rate of taxation imposed there.

The question was whether the mortgage was liable to taxation where the trustees resided, or where the property mortgaged was located and

the cestui que trusts resided. It was contended on behalf of the trustee, that the legal estate in debt vested in him, and the universal rule as to personal property was, that it followed the domicil of the owner; that he alone had the right to receive, to sue, and recover judgment,
39 if not paid, and to release, if paid. On the other hand, the counsel for the city contended, the cestui que trusts were the owners in the legal sense. This court held, that the thirteenth article of the bill of rights (now 15th) declaring that every person holding property in this State, ought to contribute his proportion of public taxes, according to his actual worth in real or personal property, meant a legal obligation to contribute taxes and such obligation could only be imposed on the person holding the legal estate; and the acts of assembly requiring all property owned by persons residents of this State, and not permanently located elsewhere within the State, to be valued to
40 the owner within the county, district, or city wherein he may reside, were gratified by assessing such property to the trustee, at the place of his residence. To ascertain the location of the property for which the taxes claimed were assessed, they held "upon the principle that the possession of personalty follows the person owning the legal title, the mortgages so far as they could be made the basis of assessment were beyond the jurisdiction of the appellee.

The assessment in such cases is made upon the amount of the mortgage debt, and not upon the value of the property mortgaged to secure it. As the basis of the assessment is the amount of the debtor's
41 obligation to the creditor the recording of the mortgage in another county or district than that of the creditor's residence, collaterally securing its satisfaction, cannot have the effect of locating the debt where the mortgage is recorded.

The principle here applied to counties and cities within our own State has been long established between independent States.

"It is a clear proposition (said Lord Loughborough) not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible
42 locality, but that it is subject to that law which governs the person of the owner, both with respect to the disposition of it, and with respect to the transmission of it either by succession or by act of the party; it follows the law of the person. The owner in any country may dispose of his personal property. If he does, it is not the law of the country in which the property is, but the law of the country of which he was the subject, that will regulate the succession." (1 H. Blac., 690; Sill vs. Worsick; Bain vs. Whitehaven, and Furress Junction R. C., 3 H. L. Cases, 19.) Judge Story declares "mobilia sequ'ntur personam" is the maxim of our own, as of the Roman law. The personal estate of a testator accom-
43 panies him wherever he may reside and become domiciled, so that he acquires the right of disposing of and dealing with it according to the law of his domicil. (Story's Conflict of Laws, 3 edi., 638, 639; Brewer vs. Freeman (Priv. Council, May, 1857); 3 Jur. N. P., 202; Anderson vs. Lanersville, 9 Moore, P. C., 325.) The cases referred to as exceptions to this universal rule are rather modifications of it in some particulars, than exceptions, although the mode of alienation may be prescribed by the "lex loci," yet the right of the owner to dispose of the thing in action is not questioned. The exceptions, such as public stocks or funds, which can only be legally transferred ac-
44 cording to the local law, may still be so disposed of under the

law of the domicil as to give the purchaser a right of action to compel the transfer according to the "lex rei site." (Story's Conflict of Laws, s. 383, note 2; Kent Com., sect. 45, p. 145, 146, 3d edit'n.)

There is no principle of public law that prevents a State from taxing such stocks where the owner resides, unless the exemption of them from taxation by the State which issues them distinguishes them from other choses in action.

It is a fundamental principle "that the laws of one country can have no intrinsic force 'proprio vigore' except within the territorial limits and jurisdiction of that country." (Story Conflict, p. 11, sec. 7.)

45 "Whatever extra territorial force they are to have is the result not of any original power to extend them abroad, but of that respect which, from motives of policy, other nations are disposed to yield to them." (Ibid.) That no State can pass any law impairing the obligation of contracts is a cardinal maxim of constitutional law.

The application of this rule to the acts of a State violating its own contracts, grants, or charters, as the charters of institutions previously incorporated by the State, or to the exemption of land from taxes within their own borders, is too familiar to require more than a reference to a few leading cases. (Vide Fletcher vs. Peck, 6 Cranch,

46 87; New Jer. vs. Wilson, 7 Cr., 164; Senet vs. Taylor, 9 Cr., 43; Dartmouth College vs. Woodward, 4 Wheat, 518.)

The inquiry is, does it restrain or prohibit the imposition of taxes by a State upon the property of its citizens or residents invested in the stocks of another State exempted by the law of that State from taxation?

It is too clear for argument, upon principle as well as authority, that the State exempting such stock could not impose such a tax upon its holders without violating or impairing the obligation of its contract. (Murray vs. Charleston, 95 U. S. R., 445.)

In the case last cited the Supreme Court of the U. S. declined

47 determining the question now presented, because it was not necessarily involved in that case. Here the question arises in limine and must be disposed of. The inhibition of the Federal Constitution, as interpreted in other cases, refers to the obligation of the contract between the State and its grantee or obligee, and not between the obligee and third parties in whose behalf rights might supervene. The effect of acts of limitation or insolvency, or laws repealing former laws in the nature of grants, or conferring vested rights, are examples coming within the letter or spirit of the prohibitory clause.

The exercise of the power to tax property or rights in action

48 vesting in such contracts does not, in any sense, impair the contract, but rather enforces it, by asserting rights incidental and collateral to them.

The contract of exemption is, by its terms, limited to the State granting it, as its authority is only co-extensive with its territory, and cannot "proprio vigore" operate on the rights and powers of other States.

The situs of the stock being that of the domicil of its holder, his property or "jus disponendi," according to the law of nations, is subject to the sovereign powers of the State wherein he resides.

Whether this power should be exercised or not is a legislative,

49 not a judicial, question.

The owner being, according to the constitutional obligation, bound to contribute to the support of government in proportion to his worth in real or personal estate cannot complain if he is fairly taxed according to his ability by the legislature of his domicil.

Taxation and representation are correlative rights. Wherever a citizen, a resident, is represented, actually or constructively, he is presumed to owe obedience to the laws of the State which protects him. They secure every right which he enjoys, and the State is entitled to all the means necessary to maintain them.

50 "No nation can be justly required to yield up its own fundamental policy and institutions in favor of those of another nation." (Story Con. Laws, ch. 2, sec. 25.)

"A nation is not under any obligation to recognize rights, contracts, or acts which are to its own prejudice, or in opposition to its *now* settled policy." (Story Con., p. 97, s. 70; 1 Burge Com. on Col. & For. Law, p. 1, ch. 3, s. 3, p. 129 to 134.) The prejudicial consequences of allowing citizens of this State the benefit of exemption from taxation and granted by other States are too obvious to need illustration. The tendency of capital to seek investment where it will be free from

51 all contribution to public burdens is exemplified by instances too numerous to be particularized. No principle of comity can be invoked to sustain claims which are contrary to the organic articles of our State constitution, and destructive of the means of preserving the public peace and public faith.

The next material question is the effect of the act of 1878, ch. 413, upon the assessments made in pursuance and by virtue of the act of 1876, ch. 260.

The professed object of the act of 1878 was to amend the second subsection of the act of 1874, ch. 483, as the said second subsection was amended by the first and seventeenth sections of the act of

52 1876, ch. 260, and to re-enact the same in a new and amended form, and also to amend the third sub-section of the act of 1874, ch. 483, as amended by the act of 1876, ch. 340, and to re-enact the same in a new and amended form.

It did not propose to alter, change, or repeal the act of 1874, ch. 483, in any other respect than those specified.

The act of 1874 constituted a standing article of the code of P. G. laws, and consisted of sections and subsections. It is entitled "An act to repeal article eighty-one of the code of public general laws of the State of Maryland," entitled "Revenue and Taxes," and to re-enact the same, with amendments.

53 Section 1 enacts: "That article eighty-one of the code of public general laws, entitled 'Revenue and Taxes,' be, and the same is hereby, repealed; provided, that said repeal shall not affect or impair any right vested or acquired and existing at the time of said repeal under said article, or any section thereof; nor shall it impair, discharge, or release any contract, obligation, duty, liability, or penalty now existing, but that all suits and actions pending, and all prosecutions for penalties, crimes, or misdemeanors under said article, including all civil and criminal proceedings whatsoever, shall be prosecuted and proceeded with to final determination and judgment entered

54 therein as if said article had not been repealed."

This proviso is incorporated with the article as a standing clause, preceding and qualifying all subsequent sections as a cardinal principle in the system of revenue and taxes.

It is nowhere referred to or repealed in the subsequent acts which amend the article, and must be regarded as the basis of the legislation on that subject.

The question as to the operation of repealing and re-enacting laws under the provisions of our State constitution, art. 3, sec. 29, which re-

law of the domicil as to give the purchaser a right of action to compel the transfer according to the "lex rei site." (Story's Conflict of Laws, s. 383, note 2; Kent Com., sect. 45, p. 145, 146, 3d edit'n.)

There is no principle of public law that prevents a State from taxing such stocks where the owner resides, unless the exemption of them from taxation by the State which issues them distinguishes them from other choses in action.

It is a fundamental principle "that the laws of one country can have no intrinsic force 'proprio vigore' except within the territorial limits and jurisdiction of that country." (Story Conflict, p. 11, sec. 7.)

45 "Whatever extra territorial force they are to have is the result not of any original power to extend them abroad, but of that respect which, from motives of policy, other nations are disposed to yield to them." (Ibid.) That no State can pass any law impairing the obligation of contracts is a cardinal maxim of constitutional law.

The application of this rule to the acts of a State violating its own contracts, grants, or charters, as the charters of institutions previously incorporated by the State, or to the exemption of land from taxes within their own borders, is too familiar to require more than a reference to a few leading cases. (Vide Fletcher vs. Peck, 6 Cranch,

46 87; New Jer. vs. Wilson, 7 Cr., 164; Senet vs. Taylor, 9 Cr., 43; Dartmouth College vs. Woodward, 4 Wheat, 518.)

The inquiry is, does it restrain or prohibit the imposition of taxes by a State upon the property of its citizens or residents invested in the stocks of another State exempted by the law of that State from taxation?

It is too clear for argument, upon principle as well as authority, that the State exempting such stock could not impose such a tax upon its holders without violating or impairing the obligation of its contract. (Murray vs. Charleston, 95 U. S. R., 445.)

In the case last cited the Supreme Court of the U. S. declined

47 determining the question now presented, because it was not necessarily involved in that case. Here the question arises in limine and must be disposed of. The inhibition of the Federal Constitution, as interpreted in other cases, refers to the obligation of the contract between the State and its grantee or obligee, and not between the obligee and third parties in whose behalf rights might supervene. The effect of acts of limitation or insolvency, or laws repealing former laws in the nature of grants, or conferring vested rights, are examples coming within the letter or spirit of the prohibitory clause.

The exercise of the power to tax property or rights in action

48 vesting in such contracts does not, in any sense, impair the contract, but rather enforces it, by asserting rights incidental and collateral to them.

The contract of exemption is, by its terms, limited to the State granting it, as its authority is only co-extensive with its territory, and cannot "proprio vigore" operate on the rights and powers of other States.

The situs of the stock being that of the domicil of its holder, his property or "jus disponendi," according to the law of nations, is subject to the sovereign powers of the State wherein he resides.

Whether this power should be exercised or not is a legislative,

49 not a judicial, question.

The owner being, according to the constitutional obligation, bound to contribute to the support of government in proportion to his worth in real or personal estate cannot complain if he is fairly taxed according to his ability by the legislature of his domicil.

Taxation and representation are correlative rights. Wherever a citizen, a resident, is represented, actually or constructively, he is presumed to owe obedience to the laws of the State which protects him. They secure every right which he enjoys, and the State is entitled to all the means necessary to maintain them.

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"A nation is not under any obligation to recognize rights, contracts, or acts which are to its own prejudice, or in opposition to its *now* settled policy." (Story Con., p. 97, s. 70; 1 Burge Com. on Col. & For. Law, p. 1, ch. 3, s. 3, p. 129 to 134.) The prejudicial consequences of allowing citizens of this State the benefit of exemption from taxation and granted by other States are too obvious to need illustration. The tendency of capital to seek investment where it will be free from

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52 1876, ch. 260, and to re-enact the same in a new and amended form, and also to amend the third sub-section of the act of 1874, ch. 483, as amended by the act of 1876, ch. 340, and to re-enact the same in a new and amended form.

It did not propose to alter, change, or repeal the act of 1874, ch. 483, in any other respect than those specified.

The act of 1874 constituted a standing article of the code of P. G. laws, and consisted of sections and subsections. It is entitled "An act to repeal article eighty-one of the code of public general laws of the State of Maryland," entitled "Revenue and Taxes," and to re-enact the same, with amendments.

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54 therein as if said article had not been repealed."

This proviso is incorporated with the article as a standing clause, preceding and qualifying all subsequent sections as a cardinal principle in the system of revenue and taxes.

It is nowhere referred to or repealed in the subsequent acts which amend the article, and must be regarded as the basis of the legislation on that subject.

The question as to the operation of repealing and re-enacting laws under the provisions of our State constitution, art. 3, sec. 29, which re-

quires the general assembly, in amending any article or section
55 of the code of laws of this State, to enact the same as the said article or section would read when amended, was considered by this court in a very analogous case, Dashiell vs. The Mayor, 45 Md., 622, where it was held that the doctrine of the text-books "that the effect of repealing a statute is to obliterate it as completely from the records of the parliament as if it had never passed," etc., does not apply to our mode of legislation; "that the repealing and enacting part of the act take effect at the same instant of time, and the enacting part substantially re-enacts the provisions of the first statute," for which position, it is said, there is high authority, referring to Fuller-
56 ton vs. Spring, 3 Wis. 667; Alexander vs. State of Md., 337; Knoup vs. The Piqua Bank, 1 Ohio 603.

In the case of Dashiell the action was assumpsit to recover taxes assessed for improvements, under an ordinance which was afterwards rescinded and another substituted, giving another form of remedy.

The tax was local and temporary, yet this court referred to the general principle that wherever a duty was imposed by act of assembly, and no other mode of enforcing it was prescribed, the action of assumpsit will lie, on the principle "that where the law gives a claim to one against another it raises an implied assumpsit on the legal obligation to pay."

57 The system of revenue and taxation for State and municipal purposes being a continuous and permanent system, necessary to meet the ever-accruing wants and exigencies of the communities for which they are levied and assessed, it cannot be presumed that there ever was a moment of time in which any citizen was absolved from the obligation of contributing to the public burdens in proportion to his ability to pay.

The laws providing for the assessment and collection of these taxes have, therefore, never been suspended or repealed, and the duties and obligations they imposed have not been discharged or released, and all proceedings instituted under the act of 1876 are still in full force and effect, the act of 1878 in no wise altering or repealing them. The
58 latter act being prospective in its operation, it results from the principles announced and the conclusions drawn from them in the foregoing opinion, that the order appealed from in this case must be reversed, except as to the sum of $10,000 private securities, admitted at the argument to be improperly assessed.

And afterwards to wit, on the 25th day of February, 1879, the said Elizabeth Patterson, by her attorney aforesaid, filed in the court of appeals here, her petition for a writ of error and order thereon in the words following, to wit:

ELIZABETH PATTERSON,
vs.
THE APPEAL TAX COURT OF BALTIMORE City.

59 To the honorable James Lawrence Bartol, chief judge of the court of appeals of Maryland.

The petition of Elizabeth Patterson, the appellee in a cause lately determined by the said court, and therein entitled "The Appeal Tax Court of Baltimore City, vs. Elizabeth Patterson," respectfully shows: that in the said cause a right and immunity was claimed by your petitioner under the Constitution of the United States, to wit, the immunity from

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55 of the code of laws of this State, to enact the same as the said article or section would read when amended, was considered by this court in a very analogous case, Dashiell vs. The Mayor, 45 Md., 622, where it was held that the doctrine of the text-books "that the effect of repealing a statute is to obliterate it as completely from the records of the parliament as if it had never passed," etc., does not apply to our mode of legislation; "that the repealing and enacting part of the act take effect at the same instant of time, and the enacting part substantially re-enacts the provisions of the first statute," for which position, it is said, there is high authority, referring to Fuller-
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59 To the honorable James Lawrence Bartol, chief judge of the court of appeals of Maryland.

The petition of Elizabeth Patterson, the appellee in a cause lately determined by the said court, and therein entitled "The Appeal Tax Court of Baltimore City, vs. Elizabeth Patterson," respectfully shows: that in the said cause a right and immunity was claimed by your petitioner under the Constitution of the United States, to wit, the immunity from

taxation by the State of Maryland upon property consisting of interests in the public debts of the States of New York, Pennsylvania, and Ohio, respectively, or in the debts of public territorial corporations existing by virtue of the laws of the two States first above named and
60 constituting agencies of government therein, respectively, whereof, to wit, of the above mentioned interests in the debts aforesaid, all are shown by the record to be of the character generally known as "registered stock," and the larger portions to have been exempted from taxation by virtue of the laws of the several States aforesaid, authorising the contracting thereof, and the remainder to have been subjected to taxation by the State of Pennsylvania, by virtue of the similar laws of the said last named State, and the right to have the said property stricken from the books of The Appeal Tax Court of Baltimore City in accordance with the provisions of sec. 28, of chap. 260 of the acts of assembly of this State, of the year 1876, and the decision of
61 the aforesaid honorable court was against the validity of the aforesaid right and immunity, so claimed by your petitioner. And further, that in the said cause the validity of an authority and statute of the State of Maryland, to wit, the above-mentioned act of assembly, and the authority exercised thereunder by the various officers and boards therein mentioned in so far as the same assumed or attempted to subject to taxation by the said State, or to valuation and assessment for the purchases of the same the above described property, was denied by your petitioner on the ground of the same being repugnant to the Constitution of the United States, and the decision of the aforesaid honorable court was in favor of their validity. And
62 further, that the decision of the said court is final and conclusive as to the suit aforesaid, and the said court of appeals of Maryland, is the highest court of this State wherein a decision in the said suit could be had. Wherefore, by virtue of the premises, your petitioner is advised, and believes that she is entitled to have the said cause so examined in the Supreme Court of the United States upon a writ of error to the said court of appeals of Maryland. May it therefore please your honor to allow your petitioner the aforesaid writ of error, and to issue citation to the above-mentioned Appeal Tax Court of Baltimore City, in the form by law for such cases prescribed, and to take
63 such other or further action in the premises as will insure to your petitioner her constitutional rights therein. And as in duty, &c.

J. NEVITT STEELE,
CHARLES J. BONAPARTE,
Of Counsel for Petitioner.

Ordered, this 24th day of February, A. D. 1879, that a writ of error be allowed and citation issue as in the foregoing petition is prayed.

JAMES L. BARTOL,
Ch. J. Court of Appeals of Maryland.

And thereupon, on the same day and year last aforesaid, the said Elizabeth Patterson by her attorneys aforesaid produced to the
64 court of appeals here, the writ of the United States of America for the correction of errors, &c., commanding the record of the proceedings and decree last aforesaid, rendered with all things concerning the same to be transmitted to the Supreme Court of the United States of America; which said writ is in the words following, to wit:

UNITED STATES OF AMERICA *ss:*

The President of the United States to the hon. the judge of the court of appeals of Maryland, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of
65 Maryland before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Elizabeth Patterson and The Appeal Tax Court of Baltimore City, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or
66 commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Elizabeth Patterson as by her complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at
67 Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite Chief Justice of the said Supreme Court, the twenty-fourth day of February in the year of our Lord one thousand eight hundred and seventy-nine.

Issued the 24th Feb'y, 1879.

JAMES W. CHEW,
Clk of the Circuit Court of the United States
for the District of Maryland.

68 Allowed by the Hon. James L. Bartol, chief judge of the court of appeals of Maryland.

And thereupon on the same day and year last aforesaid, the said Elizabeth Patterson, by her attorneys aforesaid, filed in court here the citation and admission in the words following, to wit:

The United States of America to the Appeal Tax Court of Baltimore City, greeting;

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the
69 clerk's office of the court of appeals of Maryland wherein Eliz-

abeth Patterson is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable James L. Bartol, chief judge of the court of appeals of Maryland, this twenty-fourth day of February, in the year of our Lord 1879.

JAMES L. BARTOL.

FEB'Y 24TH, 1879.

Service of this citation admitted.

C. J. M. GWINN,
Att'y Gen'l of Md. for the Appeal Tax Court of Baltimore City, Defendant in Error.

70 And thereupon, on the same day and year last aforesaid, the said Elizabeth Patterson, by her attorneys aforesaid, filed the following bond, in the words following, to wit:

Know all men by these presents: That we, Charles J. Bonaparte and Hollins McKim, are held and firmly bound unto the Appeal Tax Court of Baltimore City, in the full and just sum of twenty-five thousand dollars, to be paid to the said Appeal Tax Court of Baltimore City, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this twenty-fourth day of February, in the year of our Lord 1879.

71 Whereas lately, at a court of the court of appeals of Maryland, in a suit depending in said court between Elizabeth Patterson and the Appeal Tax Court of Baltimore City, a decree was rendered against the said Elizabeth Patterson, and the said Elizabeth Patterson having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Appeal Tax Court of Baltimore City, citing and admonishing to be and appear at a supreme court of the United States to be holden at Washington the second Monday of October next.

Now, the condition of the above obligation is such that if the
72 said Elizabeth Patterson shall prosecute her writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES J. BONAPARTE. [SEAL.]
HOLLINS McKIM. [SEAL.]

Sealed and delivered in presence of—
SAM'L J. HINDES.

Approved by—

JAMES L. BARTOL,
Ch. J. of C't of Appeals of Maryland.

FEB'Y 24TH, 1879.

In pursuance whereof and according to the form and effect of the

act of Congress of the United States of America in such case made and provided, a transcript of the record and proceedings of the decree last aforesaid, so as aforesaid rendered, with all things concerning
73 the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States of America accordingly, &c.

JAMES S. FRANKLIN, *Clerk.*

MARYLAND, *set:*

I, James S. Franklin, clerk of the court of appeals of Maryland, do hereby certify that the aforegoing is truly taken from the record and proceedings of the said court of appeals of Maryland.

In testimony whereof, I hereto set my hand as clerk, and affix the seal of the said court of appeals, this 28th day of February, A. D. 1879.

[SEAL.[

JAMES S. FRANKLIN,
Clerk Court of Appeals of Maryland.

(Indorsed:) Record. The Appeal Tax Court of Baltimore City vs. Elizabeth Patterson. Appellants costs in the court of appeals, $102.45; appellees costs in the court of appeals, $118.90; costs of transcript to Supreme Court of the U. S. of A., $19.

(Indorsement on cover:) No. 172. Charles J. Bonaparte, executor of Elizabeth Patterson, deceased, plaintiff in error, vs. The Appeal Tax Court of Baltimore City. Maryland court of appeals. Filed 1st April, 1879.

Supreme Court of the United States.

No. 172.

In Error to the Court of Appeals of Maryland.

October Term, 1881.

CHARLES J. BONAPARTE, EXECUTOR OF ELIZABETH PATTERSON, DECEASED, PLAINTIFF IN ERROR,

vs.

THE APPEAL TAX COURT OF BALTIMORE CITY.

Brief for Plaintiff in Error.

Supreme Court of the United States.

No. 172.

In Error to the Court of Appeals of Maryland.

October Term, 1881.

CHARLES J. BONAPARTE, EXECUTOR OF ELIZABETH PATTERSON, DECEASED, PLAINTIFF IN ERROR,

vs.

THE APPEAL TAX COURT OF BALTIMORE CITY.

Brief for Plaintiff in Error.

I. THE CASE.

The Legislature of Maryland enacted on April 7th, 1876, a law entitled—

Chapter 260.—An act to provide for the general valuation and assessment of property in this State.

The first and second Sections of this Statute were as follows:

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That all interest, shares, or proportions in all ships or other vessels, whether in or out of port, owned by residents of this State: all shares of stock, or shares in any bank, State or national, or in any company or corporation, incorporated by, or located in, and doing business in this State, whether owned in this State, or elsewhere; all shares of stock, or shares in any bank, State or national, or in any company or corporation incorporated by, or

located in, and doing business in any other State, or in any territory or country, owned by residents of this State; *all bonds made by any corporation or by any other State, or by any territory belonging to residents of this State; all investments in securities or stocks of any other State, territory or country*; all investments in private securities of every kind, nature and description, belonging to residents of this State, except mortgages upon property in this State, and the mortgage debts respectively secured thereon, *and all property of every kind, nature and description within this State*, shall be liable to valuation, assessment and taxation, except as provided in the next ensuing section of this act.

SEC. 2. *And be it enacted*, That the following property is expressly exempted from State, county or municipal taxation; property belonging to the United States, or to this State, or to any county or incorporated city or town in this State; houses or buildings used exclusively for public worship, and the furniture contained therein, and the ground which the said houses or buildings so exclusively used for public worship shall actually cover; graveyards, cemeteries paying no dividends, and burying grounds set apart for the use of any family, or belonging to any church or congregation; the crop or produce of any land in the State in the hands of the producer, or his agent; provisions kept for the use and consumption of the family of the person to whom the same shall belong; the working tools of mechanics and manufacturers, moved or worked exclusively by hand; wearing apparel of every description; fish, while in the possession of the fishermen employed in catching, salting and packing the same while they remain in their possession, or in that of their agents unsold; hospitals or asylums, charitable or benevolent institutions, so far as used for the benefit of the indigent and afflicted, and the ground which the buildings used as such hospitals, asylums, charitable or benevolent institutions shall actually cover, and the equipments owned by such corporations or institutions. *All other property in this State of every kind, nature and description whatsoever*, shall be liable to valuation, assessment and taxation; and all acts or parts of acts exempting any other property except that exempted by this act, from valuation, assessment or taxation for State, county or municipal purposes, which can be repealed by this General Assembly, are, to the extent of such exemption, whenever or however the same has been heretofore granted, hereby expressly declared to be repealed to the extent of said exemption

as aforesaid, and to be hereafter of no force or effect in granting such exemption.

Subsequent sections divided the State into assessment districts, organized a Board of Assessors for each district, and "Boards of Control and Review" to revise their action, and required all owners of property to make sworn returns to the former boards. Sections 18 and 28 were as follows:

SEC. 18. *And be it enacted*, That if any corporation or person be assessed by the said assessors for any property which the said person or corporation may believe to be exempted from taxation, although the same be not exempted therefrom by the provisions of this act, such person or corporation shall have the right to require the said assessors to note in a separate book, which the said respective assessors are hereby directed to provide for their use in their respective assessment districts, the particular property so claimed to be exempted from taxation, and the name of the owner thereof, and to make in said book a separate valuation of said property to the owner thereof, to the end that the said exemptions so claimed, may thereafter be separately determined by the proper Boards of Control and Review, or by the law of the land.

SEC. 28. *And be it enacted*, That any owner of property, or owner to whom property has been valued, and who shall claim that the property so to him, or it, valued, is not owned by him, or is exempted from valuation or assessment, or any person acting in behalf of such owner or person, or making such claim on behalf of said owner, may file a petition in the Circuit Court for that county in which the said property has been so valued, or in the City Court of Baltimore, if the said property has been valued in Baltimore city, setting forth the facts of the said case, and the grounds upon which said exemption is claimed, or denying said ownership; the said petition shall be filed within thirty days after the return made by the Board of Control and Review of that county, or of the City of Baltimore, in which said property shall have been valued, to the county commissioners of said county, or to the Appeal Tax Court of Baltimore City, or within thirty days after the said property has been so valued to the said owner, and notice given to him of such valuation. To said petition, the county commissioners of the county, or the Appeal Tax Court of Baltimore city, according to the locality in which such valuation

was made, shall be made defendants, and the State's Attorney of the said county, or the State's Attorney of Baltimore city, as the case may require, shall appear for the said defendants; the said defendants shall answer the said petition within ten days after they shall have actual notice thereof. It shall be the duty of the said Circuit Court, or City Court of Baltimore, to hear the said case upon petition and answer, and upon such affidavits, if any, as the court may authorize to be taken by either party, on such notice as the court may prescribe at its then session, or at the earliest practicable day thereafter; and the said court shall determine whether the said property so valued to the said owner, is or is not subject to such valuation and to assessment for State taxes, or ought or ought not to be valued to said owner. If the said court shall determine that the said property is not subject to such valuation or assessment, or ought not to be valued to said owner, it shall, by its order, direct the said county commissioners, or the said Appeal Tax Court, as the case may be, to strike the said property from the list of property valued to such owner; but if it shall determine that the said property is subject to valuation and assessment, or to valuation to said owner, it shall so determine by its order.

And Section 30 authorized an appeal by either party from the order of Court, mentioned in Section 28.

The Plaintiff's testatrix in accordance with this law returned to the proper assessors the following property. (Record, pp. 1 and 2.

City of New York Stock, 6 per cent.....	$105,100
City of New York Stock, 7 per cent.....	15,000
County of New York Stock, 7 per cent.....	10,000
County of New York Stock, 6 per cent.....	50,000
State of New York Stock, 6 per cent.....	3,000
State of Pennsylvania Stock, 6 per cent.....	50,000
State of Ohio Stock, 6 per cent.....	86,000
City of Philadelphia Stock, 6 per cent.....	116,000

At the same time requiring them, in pursuance of Section 18, *supra*, to note her claims that such property was exempted from taxation for the reasons set forth more at length in her petition. (Record, p. 2.) The Board of Control and Review by which this return was revised, disallowed these exemptions, and otherwise altered the list of her taxable property to her prejudice: she thereupon

filed a petition in the Baltimore City Court, praying that the above and certain other property should be stricken from the lists as provided for by Section 28, *supra*. The Defendant in error having consented to a *pro forma* order granting the relief prayed, this order was reversed, so far as affected the property above mentioned, by the Court of Appeals of Maryland, which reversal is the error assigned. (Record, p. 25.)

II. The Pleadings and Proof.

The petition claims the exemption from taxation of all the stocks returned to the assessors by reason of their public character, and the facts that all of them, except $58,000 City of Philadelphia 6 per cent. stock, were exempted from taxation of every kind by the laws of the States of New York, Pennsylvania and Ohio, respectively authorizing their issue, while the above mentioned $58,000 had always been taxed by the State of Pennsylvania, and the tax paid to that State by the petitioner. By amendment it was made to further charge that all the stocks in question were of the character known as "registered;" i. e., capable of transfer only on the public record books of the States and municipalities issuing them, and through the doing of acts necessarily to be done beyond the limits of the State of Maryland, and which paid their interest only at the places provided by the laws of foreign States, and likewise beyond the boundaries of this State. (Record, pp. 2 and 4.)

The answer admits the assessment of "the *property mentioned* in the said petition," and avers the ownership by the petitioner of the *said property mentioned*, &c., and that the *said property* was at the time of assessment and still is subject to taxation by the State. (Record, p, 3.)

The true effect of this answer as a question of pleading, was somewhat elaborately argued in the Conrt of Appeals, although the view taken by that Court of the effect of taxation or express exemption therefrom by the States of issue, rendered its decision unnecessary. (Record, p. 22.) The counsel for the Appellee in that Court (testatrix of the present Plaintiff in error) contended that, so far as the nature of these foreign stocks was concerned, this answer was virtually a demurrer, since the only "property mentioned in the petition," was property affected with certain incidents conferred by the laws of other States, and materially differ-

ent, both in value and legal characteristics from property not so affected. The existence and effect of these foreign laws were in the view of Maryland Courts, matters of fact only, therefore, in admitting that "the property mentioned," had been assessed as charged, this answer admitted that *public registered* stock of the States and municipalities mentioned in the petition, *which was exempted from taxation of every kind by the laws of those States authorizing its issue* had been so assessed under the general rule of judicial altercation, that every pleading shall be construed *against* the party submitting it; i. e., that whatever facts he admits, or even does not deny, shall be considered as admitted in the sense most favorable to his antagonist.

This contention is explained rather in order to render certain portions of the Record intelligible to the Court, than, because it is deemed really material to the decision of the cause here, for the object of this entire proceeding is really to have *the law* authoritatively determined, (there being ample means provided by the Maryland Statutes for correcting any errors of *mere fact* in the lists of assessment, whether to the detriment of the State or of the taxpayer,) and this Record sufficiently shows that *some* of the stocks in question are certainly so exempted by the laws of issue, as is alleged in the petition, while $58,000 are admitted not to be so privileged. (Record, p. 2,) and as to others there may be some doubt, since the certificates representing some of them, do not, on their face, set forth the immunity, and those for others had been surrendered for redemption, while the cause was awaiting trial in the Court of first instance. (See agreement of Counsel, Record, p. 6.)

This will be clear if we consider the evidence offered by the petitioner, consisting of her own affidavit, (Record, p. 5,) and specimen copies of the certificates in question. (Record, pp. 7 to 16 inclusive.) This evidence, which was uncontradicted, sufficiently established, under the agreement in the cause. (Record p. 6.)

1. The registered character of all the stocks returned by the appellee, except $3000 New York State 6 per cent stock, and $14,000 New York City 6 per cent. stock, which had been redeemed, and the certificates for them surrendered during the two years that the cause had been pending. (Record, p. 6.)

2. The exemption from taxation by virtue of the laws of their issue of the $50,000 State of Pennsylvania 6 per cent. stock,

(Record. p. 7,) and $58,000 of the City of Philadelphia 6 per cent. stock, (Record, p. 9.)

3. The taxation of the remaining $58,000 City of Philadelphia 6 per cent. stock as charged in the petition. (Record, p. 5.)

The foreign law as to the taxation or exemption therefrom of the State of Ohio, and all the New York State, city and county stock, and the entire *status* of the $3000 New York State, and $14,000 of the New York City 6 per cent. stock remains unaffected by the evidence, and is consequently to be determined by the pleadings, if, indeed, this is necessary for the decision of the case.

III. The Questions Before the Court.

Enough has been said, it is submitted, to show that these are two:

First. Is the registered public debt of one State, owned by a resident of another, constitutionally taxable as property by the latter State?

Second. If so taxable otherwise, can it still be taxed, although the State of issue has asserted its sovereignty over the property by either taxing it or exempting it from taxation in the law of issue?

IV. Some Preliminary Considerations.

A. The Statute in question expressly taxes *property*, not *persons:* under it, at all events, the right of taxation depends upon the *situs* of the property, not of its owner; if the State of Maryland *has* the right, under her own Constitution, to tax her people as well as their property, which is certainly doubtful, (State *vs.* Phila., Wilm'n and Balto. R. R. Co., 45 Md., 361, p. 377,) the Legislature did not exercise this right in passing the Act of 1876. And the question of this *situs* is wholly free from the usual presumptions against *exemptions* from taxation, for it is not whether the State has *relinquished* its power to tax property of this description, but whether it *ever possessed* such a power.

If, therefore, this Court should hold that these stocks, *as property,* were not constitutionally liable to taxation by the State of Maryland, the judgment appealed from must be reversed, even though it should further hold that the State without violating the Federal Constitution, *might have* taxed the *original petitioner* as a citizen, and measured the contribution exacted of her by what-

ever standard it saw fit; for this Court has more than once intimated that a tax may be constitutional or otherwise, according to the *mode* of its assessment or levy.

Brown *vs.* Maryland, 12 Wheat., 419, p. 441.
Almy *vs.* California, 24 How., 169.
Woodruff *vs.* Parham, 8 Wall., 123.
State Tax on Railway Gross Receipts, 15 Wall., 284, p. 294.
Murray *vs.* Charleston, 6 Otto, 432, p. 446.

Thus *the property* of a corporation may be constitutionally taxable, although its *stock* may not,

4 Wheat., 436;

notwithstanding that the stock represents the property;

6 Gill, p. 295;

and either charge must ultimately be paid by the stockholders.

B. The two questions here involved are both new in this Court. Although this was declared by the Court of Appeals in its opinion (Record p. 18,) two decisions were adverted to in the argument before that Court, and at least one has been rendered since, upon which it is reasonable to anticipate reliance by the Defendant in error. It may be well to consider and distinguish these authorities.

On State Tax on foreign-held Bonds, 15 Wall., pp. 319, 320, this Court undoubtedly adopted the doctrine *mobilia sequuntur personam,* necessarily relied upon by the Court of Appeals in its opinion, (Record p. 21,) and held that it applied to debts for purposes of taxation. But, in the same opinion, this Court also says "public securities, consisting of State bonds and bonds of municipal bodies . . . . . have acquired the character of and are treated as property *in the place where they are found, although removed from the domicile of the owner.*" (15 Wall., p. 324.) This recognition of a necessary distinction to be drawn between "public securities" and ordinary debts, is precisely the principle contended for by the Plaintiff in error, as the ground of reversal here.

It is true that this authority appears to lay undue stress upon the location of the *bonds;* i. e., the evidences of debt; but an important distinction is here to be taken between ordinary coupon bonds passing by delivery only, negotiable anywhere, and transferable without the doing of anything necessarily to be done

within the State of issue, and such securities as are described in the amendment to the petition in this cause.

(Record, page 4, top.)

In re Ewin, 1 Cr. & Jer. 151, p. 155.

Albany *vs.* Powell, 2 Jones' Eq. (N. C.) 51.

Burroughs on Taxation, sec. 45.

Attorney-General *vs.* Dimond, 1 Cr. & Jer. 356.

The *things* here taxed are *debts* due the petitioner, not *bonds* or *certificates* evidencing such debts; the two are distinguishable.

Pelham *vs.* Rose, 9 Wall. 103, page 106.

Pelham *vs.* Way, 15 Wall. 196, page 202.

Miller *vs.* The United States, 11 Wall. 268.

Brown *vs.* Kennedy, 15 Wall. 591, page 599.

Indeed only a purely arbitrary distinction can be drawn for the present purpose between a lot of ground in Pennsylvania and a share in the registered Pennsylvania State debt. Either may be owned by a non-resident; the evidence of ownership (the deed as well as the certificate) may in either case be in Maryland; in both cases any transfer of ownership must be made in Pennsylvania *and according to the forms of Pennsylvania law;* the interest no less than the rent is payable there, and there only; only by Pennsylvania could the house itself be seized for non-payment of taxes; but it would be equally possible for that State, and equally impossible for any other to levy under similar circumstances upon the stock. It was no doubt from the face of these analogies that the public debt of England was at one time held to be real property.

In re Ewin, 1 Cr. & Jer., *supra.*

And although this rule has been changed for general purposes, it is submitted that reason and justice demand its application still for those of taxation.

In Murray *vs.* Charleston, 6 Otto, 432, this Court decided that "a city when it borrows money and promises to repay it with interest cannot by its own ordinances under the guise of taxation relieve itself from performing to the letter all that it expressly promises to its creditors," (p. 433,) and that a law authorizing it to do so, was void under Art. I, sec. 10, of the Constitution. In other words, this authority establishes that a tax on debts due by a municipality to a non-resident cannot be collected by withhold-

ing a portion of the interest when payable under the terms of the contract of loan. But the constitutional objection sustained by this Court was to the *method of collection* only; provided that the levy was "so regulated as not to include a lien of the tax on the fund," and "the creditor . . . . . no otherwise acted upon than as every other possessor of money," (p. 446,) "the power of a State to tax its own bonds," (p. 447,) "or a debt due by one of its municipalities to a non-resident," (p. 448,) is expressly and pointedly left unchallenged by the opinion.

On the question therefore of the proper *situs* for taxation as property of such securities as constitute the subject-matter of this controversy, the correctness of the decision reversed in that case, *i. e.*

Jenkins *vs.* Charleston, 5 Rich., (N. S.,) 393,

as well as those rendered in

Champaign Co. Bank *vs.* Smith, 7 O. St., 42, and

People *vs.* Home Ins. Co., 29 Cal., 533,

referred to in the opinion, (p. 447,) and

Brit Com. Life Ins. Co. *vs.* Commrs., 4 Keyes, (N. Y.) 303,

which is to the same effect, are not questioned in the opinion.

Finally in Kirtland *vs.* Hotchkiss, 10 Otto, 491, this Court held that "whether the State of Connecticut shall measure the contribution which *persons* resident within its jurisdiction shall make by way of taxes in return for the protection it affords them by the value of the credits, choses in action, bonds or stocks which they may own, *other than such as are exempted or protected from taxation under the Constitution and Laws of the United States*, is a matter which concerns only the people of that State, with which the Federal Government cannot rightly interfere." (p. 499.) The words italicized indicate sufficiently the double distinction to be drawn between that case and the one at bar. Granted that the State of Maryland *had* the constitutional right to tax the *person* of this petitioner and "measure the contribution" she was to "make by way of taxes in return for the protection she personally enjoyed by her ownership of these or any other securities, the Act of 1876 is no exercise of that right, it is expressly declared to be the attempted exercise of a wholly different power, (*i. e.*, that to tax the securities *as property*,) which we deny that the State does possess under the Constitution and the *expressed purpose* of the Act determines its validity. Compare:

The Mayor, &c. *vs.* Moore & Johnson, 6 H. & J., 375.

Burns, &c. *vs.* The Mayor, &c., 48 Md., 198, pp. 205, 206.

Again the whole question of the taxability of this property depends upon whether it *is* "exempted or protected from taxation under the Constitution," and as the opinion in 10 Otto in nowise questions the distinction regarding the *situs* for taxation drawn in 15 Wall., p. 324, between public securities and ordinary debts, although it recognizes that submitted *supra* between debts and the bonds evidencing them, (p. 498,) the vital question in the case at bar is, at least, left open by the last decision, which, it should be noted, has been rendered since that of the Court of Appeals. (Record, p. 18.)

C. Although the Court of Appeals considers in its opinion no constitutional objections to the tax imposed upon these securities except the assumed suggestion that it might impair the obligation of contracts, (Record, p. 22, marg., p. 48,) it is but proper that this Court should be informed that the particular objection there answered was not urged upon that Court, and is not relied upon here; the learned judge delivering the opinion appears to have misapprehended the position of the original petitioner in this respect.

V. Why one State of the Union cannot constitutionally tax the public debt of a Sister State.

"The power to tax involves the power to destroy." (4 Wheat., 431; 20 Wall., 663.)

It is true that "taxation does not necessarily and unavoidably destroy," (4 Wheat., *supra*,) but "it is obvious that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition." (12 Wheat., 439.) "A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every State bank of circulation within a year or two after its passage." (20 Wall., *supra*.) If, therefore, the State of Maryland can tax the public debt of the State of Pennsylvania when due to her citizens, she may go farther and prohibit her citizens from loaning money to the State of Pennsylvania at all. Indeed, she does this practically by this very act: it is commercially impossible for a citizen of Maryland to hold such securities as are evidenced by specimen certificates Nos. 1 and 4, (Record, pp. 7 and 9,) when they net him but *four per cent.*

interest, and his neighbor across the border fully six; or to pay taxes on City of Philadelphia Stock, when for Philadelphians it would be taxed but once. And it is matter of personal knowledge to the preseut Plaintiff in error, that more than nine-tenths of the large amount of stocks returned by his testatrix to the Assessors have passed into the ownership of non-residents of Maryland since their taxability was asserted by the Court of Appeals, and solely because of that decision.

This Court has decided that the States cannot tax Federal loans, (Weston *vs.* City of Charleston, 2 Pet., 469,) for precisely the reasons set forth *supra*, and on principles which exclude likewise the right of the United States to tax any agencies of States, or the States to tax agencies of the Federal Government.

Dobbins *vs.* Commissioners of Erie Co., 16 Pet., 435.
United States *vs.* Railroad Co., 17 Wall., 322.

And it must be remembered that in none of these cases was there any *express prohibition* in the Constitution of such taxation: its rightfulness was denied because it would defeat the general intent and purpose of that instrument, and was inconsistent with the form of government which it established or recognized.

There is not any "want of original power in an independent sovereign State to prohibit loans to a foreign government," (2 Pet. *supra*, p. 468,) but it is of the same class of powers which authorize it to prohibit its citizens from making any contracts with, or performing any service for, such a government. If the State of Maryland can forbid subscriptions by its citizens to an Ohio or New York loan, it can forbid their selling to those States arms for their militia or police, stationery for their public schools, engines for their firemen, or indeed anything which they may need as sovereigns.

Such rights are undoubtedly inherent in really independent and sovereign States, as are those to regulate, and even prohibit, commerce with their neighbors, to keep troops and ships of war in time for peace, to issue letters of marque and reprisal and to make war; possibly at one time the States of the Union possessed both classes of rights, but we submit that they relinquished by subscribing to the Federal Compact the former class, as clearly by implication, as the latter by the express provisions of the Constitution. For, although laws passed in exercise of the first named powers, would be binding on the subjects of the nation enacting

them, e. g., England might lawfully make it felony for British subjects to sell or loan anything to France, their enactment would constitute distinctly and unmistakably *unfriendly acts* towards the State, thus placed under a ban ; acts justifying, under the principles of International Law, retaliatory legislation, and suspension of diplomatic intercourse ; and even, if persisted in systematically, affording a *casus belli.* Now we submit that any acts towards sister States, which would be unfriendly among independent nations, are forbidden to the State of Maryland, by the general intent and purpose of the Constitution. Its framers contemplated a Union of States dwelling together in the closest amity and perpetual alliance: a Union of States mutually hostile and discordant, casting affronts on each other's dignity, and aiming to harass and impede each other's administrative instrumentalities, was not the Union they had in view: it is almost a contradiction in terms to call it a Union at all.

This must not be misconstrued as any denial of the principle asserted in Hotchkiss *vs.* Kirtland. A State *may* forbid its citizens to loan money on mortgage altogether, as it may to keep lotteries or sell liquor, or take usury ; such a law might be very foolish, but this would not render it invalid. The subject being clearly within the competency of the State Legislature, "the only security against the abuse of this power, is found in the structure of the government itself . . . . . the Legislature acts upon its constituents." (4 Wheat., 428.) Provided the express prohibitions of the Constitution are respected, a Legislature may therefore tax debts due its citizens, whether by residents or non-residents, and however secured, to whatever extent, and in whatever form it may deem advisable. But debts due by another State or its municipalities, stand on a different footing. Each State in entering the Union abdicated a portion of its sovereignty in return for certain well understood advantages. One of these was assuredly the greater convenience and facility it would enjoy, in obtaining instrumentalities for local government. *Non constat* that the people of New York or Pennsylvania would have consented to forego their antecedent right to prohibit importations from Maryland, if they had understood that Maryland could still prohibit loans or sales to their governments. To infringe upon their immunity is to deprive them of the consideration for the great contract. It is no answer to say that they did not expressly reserve these privileges in the Constitution. "The enumeration in the Constitution of certain rights shall not be construed to deny

or disparage others." . . . . . (Amendments, Art. IX.) The Constitution does not *totidem verbis* forbid a State's taxing United States stock or banks, or Federal officers' salaries, nor the United States from taxing the revenues of a State or its municipalities, but all these limitations on the taxing powers of either government have been inferred from its spirit and purport only. Nor does it matter that the tax complained of, may be imposed equally upon all other property owned by residents of the State. "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent . . . . . which the will of each State . . . . . may prescribe." (2 Pet., 466.) If these securities "may be taxed lightly, they may be taxed heavily; if justly, oppressively." (17 Wall., 327.) This is not "a case of confidence." We know that "the people of any one State would not trust those of another, with a power tocontrol the most insignificant operation of their State government." (4 Wheat., 431.) We deny, therefore, that they intended to entrust to their discretion the amount of "a tax on the power to borrow money on the credit of" their State, (2 Pet., 469,) and refuse to allow "the beginning of such taxation." (17 Wall., 328.)

VI.—The Effect of Exemption Granted or Taxation Imposed by the Laws of Foreign States Authorizing the Stock's Issue.

"Full faith and credit shall be given in each State to the public acts . . . . . of every other State."

Constitution, Art. IV, sec. 1.

This provision requires that the Courts of each State shall give to these acts the same effect as would rightly be given to them by the Courts of the State so "acting."

Mills *vs.* Duryee, 7 Cranch, 481.
Christmas *vs.* Russell, 5 Wall. 290.
Green *vs.* VanBuskirk, 5 Wall. 310.
Same *vs.* Same, 7 Wall. 139.

The registered public debt of a State may be personal property, but the law which creates it may separate it from the person of its owner for purposes of taxation and give it a *situs* of its own.

Tappan *vs.* Merchants Nat. Bank, 19 Wall. 490.

And to such a law the Courts of other States must give the same effect as would be given by those of the State of issue.

For it is evident that mere choses in action are given the incidents of property rather by legal fiction and metaphor than from any inherent propriety. Indeed the most essential attribute of property (assignability) was denied them by the common law, and given only by statute and the custom of merchants.

Williams on Personal Property, pages 4* and 5*.

Clearly then such properties will be held to be *moveable* or *immoveable*, according to the purpose for which they are considered, and the legal fiction which gives them *existence* will locate them now in one place, now in another, as the ends of justice may require. In determining questions of marital rights, alienation and succession, debts have been held to have only the *situs* of the creditor, but for other purposes, such as those of attachment and confiscation, they have been given a different *situs* by decisions of unquestionable authority.

Miller *vs.* The United States, *supra.*
Brown *vs.* Kennedy, *supra.*
Green *vs.* VanBuskirk, *supra.*

And even for the purposes first-mentioned *public* debts are governed by the law of the debtor State, *e. g.* such debts can be administered upon only in the State owing them.

There is the greater reason why the same *situs* may be given to them by Statute for purposes of taxation, since if they are taxed as *property*, it seems impossible that any other *situs* can be found for them than the place where they are transferred, bear interest and must ultinately be paid. Taxation is an attribute of sovereignty; it extends to everything which exists by the State's authority or is introduced by its permission.

McCulloh *vs.* Maryland, 4 Wheat., 316, p. 439.
Howell *vs.* The State, 3 Gill, 14.
United States *vs.* Rice, 4 Wheat., 246.

But over nothing is a State now completely sovereign: nothing exists more evidently by its own authority or is introduced more completely by its own permission, than its own debt, and that of its municipal corporations. Nothing can be more entirely removed from the control of any other State. It is equally unquestionable that taxation is the equivalent of protection: unless some return

is made by the government for the property taken, exacting it "is none the less robbery because it is done under the forms of law and called taxation."

Loan Association *vs.* Topeka, 20 Wall., 655, p. 664.
Cooley on Taxation, 42.
51 Barb., 356.
35 N. Y., 440.

But what protection does or can one State of the Union afford to the interests of its citizens in the public debt of another State. Where is the equivalent of the burden? The value, the security, the very existence of the property depend upon the political well-being of the debtor State; there, and there only, can the expenditure of public money be called a benefit to the creditor. This right of a State to subject to its taxing power debts which are the creations of its legislative will has been recognized even when the debts are those of only private corporations.

15 Wall. *supra*, p. 322.

If then the States of issue have given these securities a *situs* for taxation, they cannot, *as property*, be taxed elsewhere. And we submit that this is the effect in law of taxing them, as has been done by the State of Pennsylvania. (Record, pp. 2, 5, 10 and 11.) For it would seem to be a self evident proposition that the same property cannot for the same purpose have its *situs* in two places at once.

Jackson *vs.* Railroad Co., 7 Wall. 262, p. 268.
Mayor &c. *vs.* Stirling & Ridgely, 29 Md. 49.
State of Missouri *vs.* St. Louis Co. Ct., 47 Mo. 594, p. 600.

Nor is this less true, when the State of issue has asserted the right to tax by granting exemption from it.

Exemption from taxation increases the value of a public stock, and enables it to be issued on more favorable terms. It is, therefore, practically a *capitalization* of future taxes, or a tax imposed *once for all* at the time of issue. The privilege is volueless unless the *property* exempted would, but for such exemption, be subject to the taxing power of the State.

We therefore submit, that in denying to the Statutes of Pennsylvania at least, the effect of withdrawing from the taxing power of Maryland the property evidenced by specimen certificates, Nos. 1, 4, 5, 6 and 7, (Record, pp. 7, 9, 10 and 11,) the Court of

Appeals failed to give to these "public acts" the same force which would have been rightly given them by a Pennsylvania Court, and consequently erred under Art. IV, sec. 1, of the Constitution, as interpreted by this Court.

VII. Summary and Conclusion.

Stated briefly the two main propositions submitted in the foregoing argument are:

First. That for one State to tax the loans of its citizens to another State, involves its right to prohibit such loans, and this implies an equal right to forbid all dealings with the governments of other States on the part of its citizens: and that such a power is inconsistent with the mutual amity imposed on all the States by the Constitution.

Second. That the registered public debt of a State is properly subject to the sovereignty and therefore to the taxing power of that State, and that whenever this sovereignty is asserted by either taxing this debt or exempting it from taxation, these public acts of the State must be recognized by the Courts of other States as giving it, a *situs* for taxation *as property*, in the State of issue under Art. IV, sec. 1, of the Constitution.

We have further maintained:

1. That this Statute imposes a tax upon *property*, not upon *persons*, and

2. That the same property cannot at the same time have two *situses* for the one purpose of taxation.

Assuming the last two propositions to be undeniable by reason for the first, of the express language of the Act and, for the second, of the axioms of common sense, it is evident that the Federal question presented by this Record is substantially this: Is the one proper *situs* for taxation under the Constitution for such *property* as is described in the petition in the State owing the debts, or in the State of the creditor's residence? In addition to what has been urged in this connection *supra* the following considerations of public policy are submitted in behalf of the former construction:

1. It shuts the door to fraud and perjury. The ownership of the debt of each State can be determined by its fiscal officers from an inspection of public records always open to them; that of the debt of other States can be learned only from the returns of tax payers. To say nothing of the gain to public morality, the

advantages to the treasury, in the narrowest sense, of a mode of collection dependent in nowise upon the consciences of contributories, would almost certainly be many times the amount of the most rigid tax on foreign investments.

2. It simplifies the whole method of collection. The stock, the thing taxed, can never be taken out of the State, and it can be levied upon and sold whenever the taxes are in arrears. If a resident of one State, on the other view, had *all* his property invested in the debts of other States, (a perfectly supposable contingency,) it is hard to see how he could be *compelled* to pay any taxes at all.

3. It gives the public debt of each State a fixed value the same for all investors, and in each of the great financial centres of the country. This is of almost incalculable advantages both to States that wish to borrow from all the disposable capital of the country, and to capitalists who wish the largest choice of investments. The opposite construction would, in the last resort, confine the loans of each State to its own citizens.

4. Finally it gives the citizens of one State a direct interest in the good order and prosperity of sister States; tends to prevent provincial jealousies and sectional antagonisms; avoids the danger of reciprocally hostile legislation by each State against the credit of its neighbor, and promotes the "more perfect union" aimed at by the constitution.

I. NEVITT STEELE,
CHARLES J. BONAPARTE,
Of Counsel for Plaintiff in Error.

SUPREME COURT U. S.
FILED
DEC 2 1881

IN THE

Supreme Court of the United States,

No. 172.—October Term, 1881.

CHARLES J. BONAPARTE,
EXECUTOR OF ELIZABETH PATTERSON,
PLAINTIFF IN ERROR,

against

THE APPEAL TAX COURT OF BALTIMORE CITY,
DEFENDANT IN ERROR.

BRIEF

OF

CHARLES J. M. GWINN,

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for the Defendant in Error.

W. K. BOYLE, Printer, Corner Baltimore and St. Paul Sts., Baltimore.

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THE APPEAL TAX COURT OF BALTIMORE CITY, DEFENDANT IN ERROR.

Brief on the part of Defendant in Error.

The following properties, belonging to the testatrix of the Plaintiff in Error, were valued to her, in 1876, in her life-time, in the assessment District in Maryland in which she resided, under the provisions of the General Assessment Act of Maryland, known as the Act of 1876, chap. 260. Record p. 1.

City of New York 6 per cent. stock.....$105,100

Of this amount, thus invested, $14,100, it was agreed, Record p. 6, was expressed by certificates in the form No. 10, Record, p. 13; $35,700 were expressed by certificates in the form No. 11, Record, p. 13; $2000 were expressed by certificates in the form No. 12, Record, p. 14; $26,000 were expressed by certificates in the form No. 13, Record, p. 14; $500 was expressed by a certificate in the form No. 14, Record, p. 15; $5700 by certificates expressed in the form No. 15, Record, p. 15; and $6500 by certificates in the form No. 16, Record, p. 16.

No certificate was exhibited of $14,000 of the said $105,100 City of New York 6 per cent. stock, because this amount had been redeemed pending the proceedings in the cause. Record, p. 6.

None of these certificates expressed upon their face that the investments which they evidenced, were exempted from taxation under the laws of the State of New York.

City of New York 7 per cent. stock.....$15,000.

The amount of this investment was expressed by certificates in the form No. 9, Record, p. 12. This form does not express that the investment, which it evidenced, was exempted from taxation under the laws of the State of New York.

County of New York stock, 7 per cent.....$10,000.

No form of the certificate expressing this indebtedness is supplied by the Record.

County of New York stock, 6 per cent.....$50,000.

These certificates were expressed in the form No. 8, Record, pp. 11 and 12. The certificate set forth does not express upon its face that the investment, which it evidenced, was exempted from taxation under the laws of the State of New York.

State of New York 6 per cent. stock.....$30,000.

Of this amount $27,000 was disclaimed, Record, p. 2, and the $3000 really owned having been redeemed, Record, p. 6, no certificate was produced.

State of Pennsylvania 6 per cent. stock.....$50,000.

This amount was expressed by certificates in the form No. 1, Record, p. 7. Upon the face of the certificate it is stated that the investment, which it evidenced, was exempted from State, municipal and local taxation in Pennsylvania.

State of Ohio 6 per cent. stock.....$86,000.

Of this amount, Record, p. 6, $76,000 was evidenced by certificates in the form No. 2, Record, pp. 7 and 8, and $10,000 by certificates in the form No. 3, Record, pp. 8 and 9. These certificates do not express that the investments which they respectively evidence were exempted from taxation under the laws of the State of Ohio.

City of Philadelphia 6 per cent. stock.....$116,000.

$58,000 of this amount was expressed in certificates in the form No. 4, Record, pp. 9 and 10; $11,000 in the form No. 5, Record, p. 10; $4000 in the form No. 6.

Record, pp. 10 and 11; and $43,000 in the form No. 7, Record, p. 11.

The form No. 4, just referred to, states upon its face that it is a "six per cent. loan, free from all taxes." The certificates Nos. 5, 6 and 7, do not express that the investments which they evidence, are in anywise exempted from taxation under the laws of the State of Pennsylvania.

The testatrix of the Plaintiff in Error filed her petition in Baltimore City Court, praying that the "*property*" so assessed to her should be stricken from the books of Assessment. Record, p. 2.

She disclaimed the ownership of certain properties, Record, pp. 2, 5, and as to these her list of taxable property was corrected, Record, p. 24. She claimed, in general words, that the parts of the public debt of the States of Ohio, Pennsylvania and New York, which she owned, and which were valued to her, were exempted from taxation in Maryland, because they were respectively exempted from taxation in those States, by virtue of the laws under which they were contracted; that the parts of the City of New York debt, and of the County of New York debt which she owned, were exempted from valuation in Maryland, because they were the debts of public territorial corporations in another State; and because they were exempted from taxation, of every kind, by the laws of the State of New York authorizing the creation of such debt; that $58,000 of the debt of the City of Philadelphia, owned by her, was exempted from valuation in Maryland, because it was exempted from taxation under the laws of Pennsylvania; and that the remaining $58,000 of the debt of the City of Philadelphia, owned by her, was

exempted from taxation in Maryland, because it was taxed under the laws of the State of Pennsylvania, and the tax thereon had been duly paid by her to said State during her ownership of the property. Record, p. 2.

She averred in an amendment to her petition, Record, p. 4, that all the aforesaid debts, so owned by her, were registered stocks, transferable only on the books of the indebted communities; and that the interest thereon was payable only at the seats of government of said States and municipalities, with the exception of the interest due by the State of Ohio, which was payable in the City of New York; and she further averred that no profit of any kind could be derived from any of said investments, except by doing of acts which must necessarily be done beyond the limits of the State of Maryland. Record, p. 3.

No proof was offered to maintain any of these averments except copies of particular securities, forming parts of the classes of securities, which were the subject of the controversy; Record, p. 6; and the affidavit of the testatrix, of the plaintiff in error, made evidence by agreement, Record, p. 4, that she had paid taxes to the State of Pennsylvania on $58,000 of the city of Philadelphia 6 per cent. stock since she had become its owner.

A *pro forma* order having been entered, by consent, in favor of the testatrix of the Plaintiff in Error, Record, pp. 4, 17, the Appeal Tax Court of Baltimore City appealed from said order to the Court of Appeals of Maryland, under the provisions of sec. 30 of the said Maryland Act of 1876, chap. 260. Record, p. 17.

That Court held, that the particular properties to which I have referred, were rightfully valued to the testatrix of

the Plaintiff in Error as properties subject to taxation. Record, p. 24.

In discussing the case I shall consider,—

First. The antecedent provisions in the organic and statutory laws of Maryland, which explain the decision of the Maryland Court of Appeals.

Second. The effect of the decision of the Maryland Court of Appeals, determining that the laws of the State of Maryland required the particular securities to be valued to the testatrix of the Plaintiff in Error.

Third. The power of the State of Maryland, under the Constitution of the United States, to direct the particular securities to be valued to the testatrix of the Plaintiff in Error for the purposes of taxation in that State.

I.

The 13th Article of the Bill of Rights appended to the Constitution of Maryland adopted in 1776, declared, "that the levying of taxes by the poll is grievous and oppressive, and ought to be abolished ; that paupers ought not to be assessed for the support of government: but every other person in the State ought to contribute his proportion of public taxes for the support of government, *according to his actual worth in real, or personal property within the State.*

By the 13th Article of the Bill of Rights forming part of the Maryland Constitution of 1850, it was declared, "that the levying of taxes by the poll is grievous and oppressive, and ought to be abolished ; that paupers ought

not to be assessed for the support of government, but that every other person in the State, or person holding property therein, ought to contribute his proportion of public taxes, *according to his actual worth in real, or personal property.*"

The same precise declaration was made by Article 15 of the Bill of Rights forming part of the Maryland Constitution of 1864, and by Article 15 of the Bill of Rights forming part of the existing Maryland Constitution adopted in 1867.

The poll tax imposed on all Taxables in the Province by the Act of 1702, chap. 1, sec. 3, [Bacon's Provincial Laws of Maryland,] for the support of the ministers of the Established Church, the broad extension of the definition of taxables to all male residents, female slaves and free negro women, above the age of sixteen years, by the Provincial Act of 1715, chap. 15, and the re-enactment of this tax, in a modified form, by the Provincial Act of 1763, chap. 18, sec. 3, will sufficiently account for the declaration of antagonism to that tax in Article 13 of the Bill of Rights prefixed to the Maryland Constitution of 1776.

The particular imposts, levied for the support of the Proprietary and Provincial governments were inapplicable to the new order of things which commenced with the Revolution; and the Maryland convention, forming a Constitution for the State, in November, 1776, while departing wholly from a poll tax system, thought it right to define the true basis of taxation in the new State.

It accepted the theory of Adam Smith, promulgated in his "Inquiry into the Nature and Causes of the Wealth of Nations," published early in 1776, [see Book V, chap.

2,] by adopting the substance of the first of his maxims of Taxation. 50 Md., 391. That maxim was, "The subjects of every State ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities, that is in proportion to the revenue, which they respectively enjoy under the protection of the State."

The purpose of the article in the Maryland Bill of Rights was to declare that every person residing in the State, or holding property therein, should contribute to the support of the State an amount proportioned to his *wealth*, in whatever form that wealth existed. The object intended to be gained was "equality of sacrifice;" or such "apportionment of the contribution of each person towards the expenses of government, that he should feel neither more nor less inconvenience from his share of the payment, than every other person might experience from his."

2 J. S. Mill, Princ. of Polit. Economy, 396 Am. Ed., 1880.

The words "real and personal property" were plainly not used in the article of the Maryland Bill of Rights in any technical sense, but were broad generic terms, intended to embrace all forms of personal wealth. They must be understood as expressing this common meaning.

Maxwell on the Interp. of Stats., 1875. Eng. Ed. 51.
Maillard vs. Lawrence, 16 How., 261.
Oates vs. National Bank, 100 U. S., 244.
Hardcastle on Construc. and Effect of Stat. Law. Lond., 1879, p. 26.

The words were used in the same broad sense in the subsequent legislation of Maryland.

When the State entered, by the Act of 1835, chap. 395, upon the creation of a large public debt for the purposes of internal improvement, it declared, by sec. 15 of that Act, that "if it became necessary, at any time thereafter, to levy a direct tax, for the support of government, or to sustain the public credit, the same should be *laid according to the 13th Article of the Declaration of Rights* [of the Constitution of 1776] *including* all goods, wares, and merchandise, belonging to citizens of this State, ships and vessels in or out of port, monies at interest on mortgage, bond, or any chose in action, stock and public securities of every description, and all income derived from shares of every incorporated institution, or otherwise, *as well as every other description of property*, real, personal or mixed, which escapes taxation under existing laws."

It will be seen that the General Assembly plainly intended to include securities of the nature of those affected by this controversy within the meaning of the word "*property*."

The same general classification of all forms of wealth, under the general designation of "*property*," was made in the Maryland General Assessment Act of 1841, chap. 23, (extra session,) intended to give effect to the solemn pledge made by the Act of 1835, chap. 395. For this Act, after particularizing, as subject to valuation and assessment, all chattels, goods, wares and merchandise, owned by residents of Maryland, debts secured by, or due on, judgment, decree, mortgage, bond, bill of exchange, promissory note from solvent debtors, debts, payable to residents in Maryland, except when such evidences of debt had been taken for goods sold and delivered after the passage of the Act,—all stocks, or shares in corporations

incorporated in Maryland or by other States, owned by residents of Maryland,—all investments in securities, or stocks, of other States, and all public loans and stocks whatsoever, belonging to such residents;—declared that these, "*and all other property, of every description whatsoever*," should be valued and assessed under the provisions of that Act.

The same purpose of grouping all forms of wealth under the general designation of *property* was shown in the next succeeding General Assessment Act of Maryland, the Act of 1852, chap. 337. It subjected, sec. 1, to taxation, property, real, personal and mixed, *of all kinds and descriptions whatsoever*, within the State, then by law liable to be valued and assessed, and chargeable with taxes in the State. In the 9th section it designated public and private securities, liable to valuation, *as parts of such property*.

In the Article entitled "Revenue and Taxes," Article 81, sec. 2, of the Maryland Code of Public General Laws of 1860, debts due to residents of Maryland, investments in securities, or stocks, of other States held by residents of Maryland, investments in all public loans, or stocks whatsoever, owned by residents of Maryland, except those created, or issued by the United States, and "*all other property of every description*" in the State were made liable to assessment and taxation in Maryland.

In the Maryland Act of 1874, chap. 483, re-enacting a new section 81 of the Code of Public General Laws, it was expressly declared, sec. 2, that all *property* of every kind, nature and description whatsoever, within the State, "*including*," among other things, all investments in securities, or stocks, of other States, * * * or in any

incorporated institution, incorporated in any other State, * * * should be liable to assessment and taxation.

These organic and statutory definitions of "personal property," supplied by the laws of Maryland, make it unnecessary for me to consider whether debts due by a State, and by Municipalities in such State, to a citizen of another State can be rightly defined simply as "personal property." That they constitute a personal property of an incorporeal nature is true in the strictest technical sense of the words. Gaius, by Tomp. & Lem., Lond., 1869, 219, 220, 203, 205, 206. Justin. Inst., Lib. 2, Tit. 2, Cooper's Ed. 87. Williams on Pers. Prop., 4th Am. Ed., 6. 1 Bell's Comm., 6th Ed., 510, 523. 1 Erskine's Law of Scot., 1871, pp. 286, 287. 2 Bell's Comm., 6th Ed., 719. Story on Confl. of Laws, 7th Ed., sec. 399. Flood on Wills of Pers. Prop., 212. These incorporeal rights are accounted and dealt in as *properties* belonging to their owner. They form, as men speak and think and act, parts of the *wealth* of the person to whom they belong. 1 Bell's Comm., 6th Ed., 510, 523. As they are named and referred to, persistently, in the legislation of Maryland as "*property*," and are manifestly intended to be embraced within the scope of such legislation as "*property*," the word "*property*," so used, must be interpreted and applied in every Court, where such legislation is considered, in the sense in which the General Assembly of Maryland *defined its intention to use it.*

Chests of Tea, 9 Wheat., 438, 439.
Elliott vs. Swartout, 10 Peters, 151, 152.
Colchester vs. Kewney, L. R., (1867,) 2 Exch., 254, 255.

When the descriptions of wealth intended to be embraced in the word "*property*" had been thus broadly

recognized by antecedent legislation, *in pari materia*, and by the Act of 1874, chap. 483, to which reference has been made, it was unnecessary that the Maryland General Assessment Act of 1876, chap. 260, passed when the Act of 1874, chap. 483, was operative, should have again specified *any* classes of property as liable to valuation and assessment. Its purpose might have been gained by subjecting to taxation *all property*, belonging to residents of Maryland, which was subject to taxation by that State, or which was permanently located in that State.

The English Succession Duty Act of 1853, (16 and 17 Vict., chap. 51, 6 Lely's Chitty's Stats., 1880, p. 478,) imposed duties on the succession to "any property, or the income thereof." See 2nd sec., pp. 479, 480. The Act did not define the meaning of the word "property." But *in re Cigala Settlement Trusts*, 7 L. R. Chan. Div., 355; it was held that Three per cent. French Rentes and Three and a half per cent. English Annuities and shares in the Bank of France, were *properties*, chargeable in England with the Succession Tax.

The familiar plan of partial designation of property, accompanied by subsequent general words, was pursued in the Act of 1876, chap. 260. The first section of the Act specified particular properties as subject to valuation and assessment, naming among them "all investments in securities, or stocks of any other State, territory, or country," but concluded with the general and important words, declaring that these named properties "*and all property of every kind, nature and description within this State*," were liable to valuation, assessment and taxation, except such as were exempted by the terms of the next succeeding section of the Act.

The exceptions referred to in the said next ensuing section of the Act, (1876, chap. 260, sec. 2,) were properties belonging to the United States, or to the State of Maryland, or to any county, or incorporated city or town in Maryland, or properties used for public worship, or for charitable, or educational, or burial purposes, or for particular personal uses, to which it is unnecessary to refer in considering this case.

But the section last referred to, which contained these exceptions, itself concluded with the following words, "*all other property*, in this State, *of every kind, nature and description whatsoever*, shall be liable to valuation, assessment and taxation; and all Acts, or parts of Acts, exempting any other property, except that exempted by this Act from valuation, assessment or taxation, for State, county or municipal purposes, which can be repealed by this General Assembly, are, to the extent of such exemption, whenever, or however, the same has been heretofore granted, hereby expressly declared to be repealed to the extent of said exemption as aforesaid, and to be hereafter of no force, or effect, in granting such exemption."

The 17th section of the Act of 1876, chap. 260, further provided that "*all personal property* belonging to a resident of this State, should be valued and assessed to the owner thereof in the Assessment District in which said owner might reside, *except goods and chattels, permanently located in any city, or county of the State*, which should be valued and assessed in the city or county in which they are so located."

These were considered to be moveables devoted to a purpose, which bound them as *fixtures* to a particular place. Savigny Confl. of Laws, by Guthrie, London, 1880, p. 180.

The 17th section of the Act of 1876, chap. 260, plainly shows the scope of the meaning which was intended to be attached to the words personal property. The section prescribed the mode of valuing the property, which had been declared subject to assessment by the previous general words of the Act. It directed that, "In valuing bonds, securities and other investments, the nature of such bonds, securities and other investments shall be briefly stated, with the respective values of each."

The scope of the Articles of the various Bills of Rights appended to the respective Constitutions of Maryland to which I have referred,—the intended meaning of the words, "real and personal property," contained in the particular fundamental articles,—the specification of all forms of public bonds, securities, or investments belonging to residents of Maryland as *property* within the State of Maryland, in the Maryland Acts of 1874, chap. 483, and 1876, chap. 260, led the Court of Appeals of Maryland to construe these Maryland Acts, under which the particular properties, which are the subject of this controversy, were valued to the testatrix of the Plaintiff in Error, at her place of residence in Maryland, as authorizing and directing such valuation of the particular properties to said person.

That Court properly decided, also, in construing the statutes of the State, that the Act of 1878, chap. 413, was prospective in its operation, and in no manner affected

this particular case. Record, pp. 23, 24. The Act of 1878, chap. 413, indeed, it would be easy to prove, made no change whatever in the taxable character of the investments which were valued to the testatrix of the Plaintiff in Error.

II.

The determination of the Maryland Court of Appeals, reached by the construction of statutes of Maryland, that the particular properties, valued to the testatrix of the Plaintiff in Error, were intended to be embraced, and were embraced, within the scope of the Maryland statutes mentioned, is conclusive upon this Court.

Elmendorf vs. Taylor, 10 Wheat., 159, 160.
Commercial Bank vs. Buckingham's Ex'rs, 5 Howard, 342, 343.
Webster vs. Cooper, 14 Howard, 504.
Rail Road Co. vs. Jackson, 7 Wallace, 266, 267.
Penn College Cases, 13 Wallace, 212.
Supervisors vs. United States, 18 Wallace, 81, 82.
Murray vs. Charleston, 96 U. S. 440.
Rail Road Co. vs. Georgia, 98 U. S., 365, 366.

III.

The magnitude of the issues involved in the inquiry, pending before the Court, will be understood when I state, upon the authority of information kindly supplied to me by the Superintendent of Census, that the Census of 1880, now in process of final tabulation, shows that the aggregate debts of the States, and of the counties, townships, school districts, cities and towns, in the respective States, are as follows:

Aggregate of State debts.....		$ 260,377,310
"	County debt.....	125,452,100
"	Townships' debts.....	30,190,861
"	School districts' debts...	17,493,110
"	Debts of cities and towns of 7500 pop. each and upwards.....	710,535,924
"	Debts of other municipalities having less than 7500 pop. each.	56,310,209
Making a total of such gross debts.....		$1,200,359,514
Aggregate of all sinking funds applicable to the above debts.....		145,051,121
Total of such net debts.....		$1,055,308,393

The owners of the greater part of these vast properties are, probably, residents of States forming parts of the United States.

The basis of the system of taxation in Maryland, enforced by the General Assessment Act of 1876, ch. 260, is, as I have said, the fundamental rule set forth in the 15th Article of the Bill of Rights, prefixed to the State Constitution of 1867. That rule is that "every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real and personal property."

The principle which this article asserts, was not stated for the first time, by the Convention which formed the Constitution of Maryland in 1776.

It was then, and is now, an existing rule of public law.

It is a rule which forms, whether declared or not, a part of the organic law of every well governed State.

It is that immoveable properties in a State, and properties permanently located in such State, are subject to taxation by such State for the support of its government, whether owned by persons residing within its limits or by strangers; and that moveable properties belonging to a resident of such State, not so located in another State as to form part of its proper wealth, and to be rightfully subject to its taxing power, shall be accounted part of the wealth of their owner in the State in which he resides, and be subject to taxation for the support of government in such State.

There never was any doubt that immoveable properties in a State, or properties permanently located in a State, were subject to the *lex rei sitæ*, and were therefore taxable by such State.

2 Domat's Civil Law by Strahan, 2nd Ed., p. 330, sec. 7.

Freke vs. Lord Carberry, 16 Eq. Cases, 466, 467.

Nor will I seek, in this argument, to except from this rule "moveables, devoted to a purpose which binds them as *fixtures* in a particular place;" Savigny on Conf. of Laws by Guthrie, 2nd Ed., London, 1880, p. 180; for such properties form parts of the proper wealth of the State in which they are fixtures, and are subject to the *lex rei sitæ*.

Green vs. Van Buskirk, 7 Wall., 150.

But it may certainly be insisted that, in the United States and in England, it is a settled rule of Public Law, that all moveable properties belonging to a resident of a State, which are not so located in another State, as to form parts of its proper wealth, have no other *situs* than the domicil of their owner.

Tappan vs. Merch. Nat. Bank, 19 Wallace, 499.
Hoyt vs. Sprague, 103 U. S., 630, 631.
Sill vs. Worswick, 1 H. B., 690.
In re Ewin, 1 Cromp. & Jer., 155.
Birtwhistle vs. Vardill, 2 Cl. & Fin., 575.
Thompson vs. Adv. Gen., 12 Cl. & Fin., 17, 20.
In re Cigala Settlement, 7 *L. R., Chan. Div.*, 356, 357.
Story on Confl. of Laws, 7th Ed., secs. 379–381.
3 Burge on Col. & For. Law, 749–751.
4 Phill. on Internat. Law, 37.

Savigny admits that this is the American, English and French doctrine. Savigny on Confl. of Laws by Guthrie, Lond. 1880, 2nd Ed., 138.

The laws of Maryland make, as has been sufficiently shown, no distinction between corporeal and incorporeal personal property. Both of these kinds of property, when they form parts of the *wealth* of a resident of the State, are treated as belonging to the general class of personal property; and both, when they form parts of such wealth, are, as has been shown, designated as *property* subject to the taxing jurisdiction of the State.

The debts due by a private corporation, created in one State, to a citizen of another State, are the property of the person to whom they are due. 1 Bell's Comm., 6th Ed.,

510. Such debts can have no *situs* separate from the domicil of the creditor. Story on Confl. of Laws, 7th Ed., secs. 362, 362a, 399. *Thomson vs. Adv. General*, 12 Cl. & F., 17. They can be taxed in his hands only.

Railroad Co. vs. Jackson, 7 Wallace, 267.
State Tax on Foreign Held Bonds, 15 Wallace, 320.
Murray vs. Charleston, 96 U. S., 445.
Kirtland vs. Hotchkiss, 100 U. S., 498, 499.

The *situs* of such debts is not separated from the domicil of their owner by any form of security, applicable to such debts, which may have been given to the creditor, or created for his benefit; *Kirtland vs. Hotchkiss*, 100 U. S., 491, 492; nor by the fact that such debts are made payable in the State in which the obligations were created, and not at the domicil of the creditor; Ibid 491; nor by any obligation which may exist to make formal transfer of them in a particular manner, or at a particular place; or by the fact that the registry of such assignments is required to be made, or kept in a particular place.

U. S. vs. Cutts, 1 Sumn., 143–149.
Black vs. Zacharie, 3 Howard, 513.
Dewing vs. Pedicaries, 96 U. S., 196.
Johnston vs. Laflin, 103 U. S., 804.
Balto. City Pass. Railway Co. vs. Sewell, 35 Md., 222, 223.
Angell & Ames on Corp., 8th Ed., sec. 354.
Thomson vs. Adv. General, 12 Cl. & Fin., 17.
In re Cigala's Settlement, 7 Law Rep., Ch. Div., 356, 357.

The debts due by States, counties and cities are not exceptions to the rule applicable to debts due by private corporations.

When States have created debts for constitutional purposes, and contracted to repay them with interest, or when municipal organizations, acting under sufficient authority, have created debts for such purposes, and have contracted to repay them with interest, they have not exercised any sovereign powers.

U. S. Bank vs. Planters' Bank, 9 Wheat., 907.
Murray vs. Charleston, 96 U. S. 445.

They have exercised the ordinary corporate power of borrowing money, in the open market, upon terms agreed upon between them and those who loaned such money.

The obligations which they have given for the payment of the interest and principal of the debts thus created, to any lender, *resident in the State or municipality which has borrowed such money*, are properties in the hands of such resident, which the particular State or municipality may tax as parts of his wealth.

Murray vs. Charleston, 96 U. S., 445.
In re Cigala's Settlement, 7 L. R. Chanc. Div., 357.

Such State or municipality cannot provide by legislation for collecting any tax, which it may impose on such property, by withholding from the creditor part of the interest or principal, which it had stipulated to pay him; because such legislation, or method of collection, would impair the obligation of its contract, which was to pay to the creditor the interest and principal *in solido*.

96 U. S., 445.

But it may, while leaving the obligation of its contract wholly untouched, direct that the property, which it has

thus created, should be valued, by some sufficient standard, as the property of any holder, residing in the State or municipality creating the debt, and may subject it, in common with other similar property, owned by residents of such State or municipality, to such taxes as it may be authorized to impose for the support of its government.

Ibid, 446.

A State, or municipality, can exercise this power, in such case, because a debt, due to a person, living within its boundaries, follows the person of the creditor, and such creditor is a resident within its territorial limits.

Railroad Co. vs. Jackson, 7 Wallace, 267.
State Tax on Foreign Held Bonds, 15 Wallace, 320.
Murray vs. Charleston, 96 U. S., 445.
Kirtland vs. Hotchkiss, 100 U. S., 498, 499.
Hoyt vs. Sprague, 103 U. S., 630.
In re Ewin, 1 Cromp. & Jerv., 155.
Thomson vs. Adv. Gen., 12 Cl. & Fin. 17, 20.
In re Cigala's Settlement, 7 L. R. Chanc. Div., 357.
1 *Jarman on Wills*, (Randolph & Talcott,) 4.

But, if the creditor is not a resident of the State, or municipal organization, exercising the taxing power, then such State, or municipality, cannot direct such property to be valued to the creditor, or subject it to taxation; because the particular property follows the person of the creditor, and such creditor is not subject to the jurisdiction of the indebted State, or municipality. See cases last cited.

Where then can such property, so owned, be taxed?

"For all national purposes, embraced by the Federal Constitution, the States and the citizens thereof are one,

united under the same sovereign authority, and governed by the same laws. In other respects, the States are necessarily foreign to and independent of each other;" *Buckner vs. Finley & Van Lear*, 2 Peters, 590; *Dickins vs. Beal*, 10 Peters, 579; *Bank of U. S. vs. Daniel*, 12 Peters, 53; and may tax all persons within their respective jurisdictions, and all property belonging to such persons within such respective jurisdictions, which is not expressly, or by necessary implication, withdrawn from their taxing power by the Constitution of the United States.

Tappan vs. Merch. Nat. Bank, 19 Wallace, 499.
City of New York vs. Milne, 11 Peters, 138.
Transportation Co. vs. Wheeling, 99 U. S. 279, 281, 282.
Hoyt vs. Sprague, 103 U. S., 630.

The States, though foreign and independent of each other in the administration of their domestic affairs, have been brought into the closest possible connection by that provision of the Federal Constitution, which declares that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Const. U. S., Art. 4, sec. 2.

Whatever may be the precise scope of this provision, *McCready vs. Virginia*, 94 U. S., 395, it cannot be doubted that it confers upon every citizen, of each State, the right to acquire property in every other State, and imposes on him the obligation to hold such property, if it remains permanently within the jurisdiction of the State, in which it was acquired, subject to the taxing jurisdiction of such State; but if it does not remain within such jurisdiction, but follows the person of its owner, to hold it subject to the taxing jurisdiction of the State of which he is a citizen.

If, therefore, the creditor of a particular State, or municipal organization, who does not reside within the territory of the indebted community, cannot be taxed by it, because the debt, due to him, which he had the constitutional right to acquire, is property, which follows his person, and he is a resident of another State, surely the State, of which he is a resident, can direct that such property, so owned, shall be valued to him, and be taxed as a part of his wealth in the State of which he is a resident.

If the State, of which such person is a resident, cannot tax such property as a portion of his wealth, no other State can tax it. The owner of such property is not within the jurisdiction of any other State, and the property, which he owns, has no *situs* in any other State. It would follow, therefore, that if the State, in which the holders of the obligations of other States, and of municipalities in other States, reside, cannot tax such properties, they are, in effect, exempted from taxation, except when they are held by a resident of the State by whose laws the issue of such obligations was authorized. Such a conclusion certainly cannot be sanctioned.

It serves no purpose to say, that the imposition of such a tax upon the bonds of other States, owned by residents of the taxing State, impairs the borrowing powers of the States, which issued the obligations, in such taxing State.

To this it would be sufficient to reply, that the right of any State to create a moveable property, exempted from taxation, even when it formed part of the wealth of other States, would yet more seriously impair the taxing powers of other States.

A State which taxes the bonds of other States, or of municipalities, created by other States, when such bonds are owned by a resident of the taxing State, impairs no power which the indebted States, or municipalities, may exercise within their respective territorial limits. It exercises only the undeniable and unlimited jurisdiction, which it possesses over all persons and things within its own territorial limits, in a case in which such jurisdiction has not been abridged by the Constitution of the United States.

City of New York vs. Milne, 11 Peters, 138.
Transportation Co. vs. Wheeling, 99 U. S., 281, 283.
Const. U. S., 10th Amendment.

Every State has a right to repair, as far as it can, the loss of taxable wealth, caused by the withdrawal from its own territories of capital belonging to a resident, by the taxation of the property which such resident has brought within its limits, in exchange for the capital with which he has parted.

If any possible loss occurs to an indebted State because of the exercise of the taxing power of another State over its bonds, when the property of a resident of the taxing State, it is certainly *damnum absque injuria*. It is the exercise of a right by the taxing State, which causes no more detriment than is necessarily the result of an artificial form of government and of conflicting public interests.

Cooley on Torts, 81.
Weeks on Dam. Abs. Inj., 16.
Sedgwick on Meas. of Dam., 6th Ed., 28.
Potter vs. Brown, 5 East, 131.

Bonds issued by the United States have their *situs* at the residence of their owner, but they are, of course, ex-

cepted from the taxing power of any State. Although the Government of the United States is possessed of limited powers, it has supreme authority so far as its sovereignty extends. *Tennessee vs. Davis*, 100 U. S., 263. *Rhode Island vs. Massachusetts*, 12 Peters, 729. No State can interfere with the operation of these powers, or impose the smallest restraint upon their use. *Transportation Co. vs. Wheeling*, 99 U. S., 281, *Tennessee vs. Davis*, 100 U. S., 263. The United States is empowered by the Federal Constitution to borrow money for the prescribed uses of the government, and may issue its bonds, as evidences of its indebtedness, showing the terms upon which the particular debts were contracted. As the Federal Government is supreme in the powers which it possesses, it is not, of course, subject, in any particular, to the powers of the State governments. A State, therefore, cannot tax the money which the Federal government has borrowed, and for which it has given its bonds, though such borrowed money may actually remain within its territorial jurisdiction, because it is the property of the Federal government. It cannot tax the instruments which evidence the debts thus created and promise their re-payment, although these belong to residents of such State, because such instruments were executed by an authority, above its own, whose contracts it cannot subject to its taxing power, even though such contracts are in themselves property. It cannot tax the credits evidenced by such contracts, as separate properties, because, until the contracts are terminated, by the payment of the money due under them, the credits are inseparable from the instruments which secure them. In a word, it cannot tax these bonds, because they are operations of a government, superior to itself, over which it cannot exercise jurisdiction or control in any form.

M'Culloch vs. Maryland, 4 Wheat., 405, 429, 432, 435.
Weston vs. City of Charleston, 2 Peters, 466–469.
Tennessee vs. Davis, 100 U. S., 263.

None of these reasons apply to the taxation by States of the obligations of other States, or of municipalities in other States, belonging to residents of the taxing States, because "the power in the States to tax for the support of the State authority reaches all the property within the State, which is not properly regarded as the instrument, or means of the *Federal* Government.

Transportation Co. vs. Wheeling, 99 U. S., 279.

Can it be said then, with reason, that the debts of States, cities and counties have no other *situs* for the purposes of taxation except the territory of the State, city or county, creating such debts?

If such a proposition could have been maintained, this Court would not, in *Murray vs. Charleston*, 96 U. S., 445, have limited the exercise of the taxing power of the States to such portions of their debts, as were owned by creditors living within the jurisdiction of the taxing States.

The proposition contended for seems to rest upon a *dictum* of Lord Mansfield in *Robinson vs. Bland*, 2 Burr., 1079, S. C., 1 W. Black, 246, cited in Story on Confl. of Laws, 7th Ed., sec. 383.

This was an action on a bill of exchange, given for money lost at play in Paris. The bill was drawn by the

loser, when in Paris, on himself in England in favor of the winner of the money.

Lord Mansfield in the course of his opinion said by way of illustration,—"In every disposition or contract, where the subject-matter relates locally to England, the law of England must govern and must have been intended to govern. Thus a conveyance or title of land, a mortgage, *a contract concerning stocks*, must all be sued upon in England; and *the local nature of the thing* requires them to be carried into execution according to the law here."

In the case, as reported in 1 W. Black, 246, the words used by Lord Mansfield are stated to have been, "so stock jobbing contracts and the statutes thereupon have reference to *our local funds*."

That opinion was delivered in 1760. So far as it relates to the funded debt of England its language must be interpreted with strict reference to the nature of that funded debt, as it existed when the opinion was rendered.

The funded debt of England, at that time, was made up of debts contracted by the Government at different periods, evidenced by annuities charged upon particular branches of the public revenue for a period of time, or in perpetuity. Smith's Wealth of Nations, Book 5, chap. 3. 1 Bell's Comm. 6th Ed. 523. McCulloch on Taxation, and Funding, 455. Williams on Pers. Prop. 4th Am. Ed. 200.

It is perfectly true that such annuities, when they were first created, were considered in England to be real property, descendible to the heir. *In re Ewin*, 1 Cr. & Jerv.,

155. Lord Hardwicke, as late as 1750, considered them, apparently, as *personal inheritances*, which the law suffered to descend to the heir. *Stafford vs. Buckley*, 2 Vesey, Sen. Belt's Ed., 178, 179.

In Scotland they were regarded *quasi feuda*, because, by their yearly produce, they bore some resemblance to permanent rights. 2 Bell's Comm., 6th Ed., 717. 1 Ersk. Law of Scot., 1871, p. 285. The inclination to treat such annuities as realty was naturally strong in Scotland, because there, by ancient law, all personal obligations, bearing interest until their maturity, were considered *heritable*. 1 Ersk. Law of Scot., 286, 287.

It is possible that the Scotch rule, and the opinion of Lord Hardwicke in *Stafford vs. Buckley*, to which I have referred, suggested the illustration which Lord Mansfield used. However that may be, it is quite certain that later authorities lead to conclusions very different from those which have been, more than once, drawn from what was said by Lord Mansfield in the case of *Robinson vs. Bland*, already cited.

Under the Legacy Duty Act of 36 Geo. 3, ch. 52, the duty was made chargeable upon the *legacy*. Flood on Wills of Pers. Prop., 608. Unless the fund, constituting the legacy, was in Great Britain the duty did not attach. *In re Ewin*, 1 Cr. & Jerv., 151. *Thomson vs. Adv. General*, 12 Cl. & Fin., 17. The *situs* of the fund was always the material inquiry. The domicil of the person bequeathing the legacy established the *situs* of the legacy for purposes of taxation. *Atty. General vs. Forbes*, 2 Cl. & Fin., 48. *Thomson vs. Adv. General*, 12 Cl. & Fin., 17. *Arnold vs Arnold*, 2 Myl. & Cr., 256. *Wallace vs. Atty. General*,

1 Ch. App. Cas., 4. *Atty-Gen'l vs. Napier*, 6 Exch. (Wels. Hurls. & Gord.) 219–222.

In the leading case of *In re Ewin*, 1 Cr. & Jerv., 150, the testator, who was domiciled in England, died possessed of considerable property in the American, Austrian, French and Russian funds, *which funds were transferable and the dividends payable in those respective countries only.*

The executor was called on to give an account of the legacies and property of the testator, *and to pay the legacy duties.*

Brougham, of counsel, contended that the property was in the nature of *real property*; and that it was, at all events, *local* property, being payable and transferable only in the countries in which the funds were.

Bayley, B, in delivering his opinion, pp. 153–155, said, that the will operated upon that which "throughout, in my opinion, *is English personal property.* It was pressed by the counsel that this property was to be considered as being in the country in which it was, *real* property. There is nothing in any part of the affidavits to show that such was the character that properly belonged to it; but some reliance was placed upon analogy between the case of this property and property in the English funds, which, in the creation of those funds, might originally be considered as being real property and descendible to the heir, but which, very soon afterwards, was considered to be personal property, and not descendible to the heir, but to go as personal property would go. Does it follow, because the English funds were originally considered as real property, that the French and American and Russian funds were also so con-

sidered?" * * * "If it is not real estate, it is personal estate; *and if it is personal estate, is it in any respect to be considered different from personal property abiding in this country?* There is no doubt but that the amount, when you are receiving the dividends, will be payable in the place in which, by the constitution of these funds, the dividends are payable; and that will be America, Paris, or St. Petersburg. But you are not to look at the place where the thing is payable, or transferable; but when once you have ascertained that it is personal estate, then you are to ascertain what are the rules of law with regard to personal estate; that personal estate being at the time not locally in this Kingdom, but being at the time locally situated abroad."

It was thereupon, p. 156, concluded that the Foreign funds, which were the subject of the controversy, were, in fact, *English personal property*, upon which legacy duties were chargeable.

The case *in re Ewin* was pointedly referred to and approved in the case of *Thomson vs. Advocate-General*, 12 Cl. & Fin. 17, 20, 22, 24, 25, 26, Lord Brougham concurring in the opinion, p. 24.

Under the Succession Duty Act of 16 & 17 Vict., chap. 51, sec. 42, the duty imposed was a first charge on the interest of the successor in all the real and personal property, in respect whereof such duty was assessed, while it remained in the ownership, or control of the successor. The act applies to the whole of the United Kingdom, but not to any country beyond those realms. *Wallace vs. Attorney-General*, L. R., 1 Ch. Appeals, 1865, m. p. 7.

In re Cigala's Settlement Trusts, 7 L. R. Ch. Div., 351,—the latest case bearing upon the question,—the facts were these. An English woman, owning English funds, French *rentes* and shares in the Bank of France, and being about to marry an Italian, assigned these properties to four trustees, three of whom were Englishmen, upon trusts, after the death of the survivor of the husband and wife, for the children of the marriage. When the controversy arose, all the trustees were Englishmen. Both parents died leaving children, who were domiciled Italian subjects.

The question was, whether the property in question was liable to the English succession tax. The fixed locality of the French Rentes was relied on by counsel, p. 354. But it was held by Jessel, M. R., pp. 355, 356, 357, that the properties in question were moveable properties; that the ownership of the properties being in persons subject to British jurisdiction, and the forum for deciding upon the claims of the children being a British Court,—and the properties being, in fact, *English property*,—the Crown was entitled to the succession tax.

I note, at this point, that the cases of *Attorney General vs. Cockerell*, 1 Price, 165, and *Attorney General vs. Beatson*, 7 Price, 560, which have some relation to the questions involved in this case, were over-ruled by *Attorney General vs. Forbes*, 2 Cl. & Fin. 80, *Arnold vs. Arnold*, 2 Myl. & Cr., 272, *In re Coles*, 7 M. & W., 394, and by *Thomson vs. Advocate General*, 12 Cl. & Fin. 23.

The reasoning of Mr. Wharton, Confl. of Laws, secs. 297–311, and the rule laid down by him, sec. 311, is supposed to be at variance with the authorities, which I have cited, and with the conclusions drawn from them.

Mr. Wharton says, sec. 311, that the rule of international law may be thus stated,—"Moveables, when not massed for the purposes of succession or marriage transfer, and when not in transit, or following the owner's person, are governed by the *lex situs*, except so far as the parties interested may select some other law."

I might content myself with the summing up of Phillimore, who, alluding to the very rule stated by Wharton, says, that, whatever may be the merits of the doctrine, the time for adopting it can hardly be said to have yet arrived.

4 Phill. on Internat. Law, 37.
Story on Confl. of Laws, 7th Ed., secs. 379–381.

No rule is of any value, which fails to supply the means of ascertaining, with precision, the subject-matter, to which it is applicable.

Mr. Wharton excepts from the operation of the *lex rei sitæ* goods, which follow the person of the owner, without incorporating in his rule any method of determining what moveables have this quality, and what moveables must be considered as devoted to a purpose, which binds them as fixtures to a particular place. Savigny on Confl. of Laws by Guthrie, London, 1880, p. 180.

So much of his rule as is applicable to the matter in controversy, amounts to no more than this: "Moveables * * * when they do not follow the owner's person, are governed by the *lex situs*." There certainly can be no question that this is true, but it does not give any help in reaching a conclusion in this case.

As the author bases his reasoning to a large extent on the text of Savigny, it would seem that he ought to have expressed in his rule, the limitation which Savigny engrafted on the theory which he adopted.

Savigny on Confl. Laws by Guthrie, Ed., 1880, p. 180.

He ought to have done more than this. The cases which I have cited show that moveable properties are not only massed for purposes of *succession* at the domicil of the person upon whom said properties legally devolve, but also for purposes of *taxation*. *In re Ewin*, 1 Cr. & Jerv., 155. *In re* Cigala Settlement Trusts, 7 L. R., Chan. Div., 357, and other cases already cited.

If these considerations had been kept in mind, the rule would have read as follows:—Moveables when devoted to a purpose which binds them as fixtures to a place, and when not massed for the purposes of succession, or marriage transfer or taxation, and when not in transit, are governed by the *lex rei sitæ*. Other moveables are governed by the *lex domicilii*, except so far as the parties interested may be competent to select and have selected some other law.

It may, some day, be decided that the debts of States, forming parts of our Federal Union, and of municipal organizations in such States, have, by the law of nations, their *situs* within the territory of the government of which, in the view of that universal law, those States and municipal organizations form parts. It can scarcely be imagined that a narrower doctrine will ever prevail.

I have not stated any principle in contravention of a rule based upon such an hypothesis, if it is ever adopted.

On the contrary, the principle, which I endeavored to deduce from the 15th Article of the Bill of Rights, prefixed to the Maryland Constitution of 1867, would be in harmony with such a rule of public law.

But, in view of the decisions of this Court, to which I have adverted, and of the relations of the States of our Union to each other, it is impossible to accept the theory of Mr. Wharton that public loans, and railway and other securities, are subject only to the *lex rei sitæ*, as the correct statement of the rules of international law applicable to such cases in the United States.

The argument, upon which he mainly relies, would not support such application of his theory. The fullest recognition of the application of the rule, *Mobilia sequuntur personam*, to the securities of States and municipalities in States, in this country, would not create, as we know, any danger that creditors, citizens of other States, in the same Union, might exercise undue political influence in the affairs of an indebted State.

Whart. on Confl. of Laws, sec. 305.

It is impossible to frame a theory, which would show that increase of danger to any State would result from holding that a debt due by it, belonging to a resident of another State, was property in such other State.

Nor is the principle, upon which I have insisted, modified, when evidences of debt, issued by a State, or municipality, are registered by the debtor community in the name of the holders of such debts, and are required to be transferred, upon a prescribed registry, in the manner directed by local laws. Such debts, when so registered,

would not in any way differ in their character of property from unregistered evidences of like indebtedness, which were transferable by simple endorsement, nor, indeed, from similar evidences of debts payable to the bearers, or holders of such evidences of debt. *In re Ewin*, 1 Cr. & Jerv., 150. Conditions, regulating the mode of transfer of such securities, existed in reference to the bonds of the City of Charleston, *Murray vs. Charleston*, 96 U. S., 440; but they did not hinder this Court from deciding that such bonds had no taxable *situs* within the municipal jurisdiction of Charleston, if their owner was a non-resident of the State. The ruling of this Court in *Johnston vs. Laflin*, 103 U. S., 804, equally shows that local conditions, regulating transfers of incorporeal property, create no *situs* for such property.

There is no reason why a debt due by a State to a citizen of another State, and which is, therefore, the property of a citizen *in such other State*, should be considered as property *having its only legal situs within the territory of the indebted State*. If any such rule is applicable to the debts of States, it is equally applicable to the debts of cities and counties in any State. Can it be supposed, that, in the absence of any legislation affecting the question, any Court would hold that the debt due by a city, or county, to a resident of another city, or county, *in the same State*, was property which had become blended with the general mass of property *in the indebted city, or county*, when the creditor did not live in such indebted city, or county? And yet, if the reasoning of Wharton is well founded, this would be the necessary conclusion.

The argument in favor of the taxing power of the State of Maryland, over the particular securities of the testatrix

of the plaintiff in error, is summed up in a portion of the first maxim set forth in Story on Confl. of Laws, secs. 18–23, cited and adopted by this Court in *Hoyt vs. Sprague*, 103 U. S., 630. "Every nation possesses an exclusive sovereignty and jurisdiction within its own territory." * * * "The direct consequence of this rule is that the laws of every State affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural born subjects, or aliens."

The argument against the existence of a taxing power in the States of New York, Pennsylvania and Ohio, and against the taxing power of the debtor municipal organizations in these States, over the particular securities, which are the subject of this controversy, when owned by a non-resident, is summed up in the second and third maxims of the same author, also cited and adopted by this Court in 103 U. S., 630, 631. These maxims, considered together, assert that no State, or nation, can, by its laws, directly affect, or bind, property out of its own territory, or persons not resident therein, unless the laws of the country, in which such property is situated, or in which such persons reside, sanction the exercise of such extra-territorial power.

These last maxims are stated, in another form, in Story on Confl. of Laws, 7th Ed., sec. 388. "The municipal laws of a country have no force beyond its territorial limits; and when another government permits them to be carried into effect within her jurisdiction, it does so upon a principle of comity."

There is no collision whatever, so far as I can discover, between the laws of New York, Pennsylvania, or Ohio,

and the laws of Maryland, in relation to the subject-matter of this controversy. The Testratrix of the Plaintiff in Error would seem to have paid, in her own wrong, to the State of Pennsylvania, the taxes on the $58,000 of City of Philadelphia 6 per cent. stock.

It may be true that a general usage, in relation to the *situs* of State and municipal bonds and evidences of debt, might, if it existed in the United States, create a different rule from that which I have endeavored to maintain upon the basis of prevailing authorities. It is respectfully submitted, however, that no such general usage exists in this country. This is conclusively proved by the references, which I subjoin, to the provisions of the Codes, Revised Statutes, or collections of the General Statutes of States, whose legislation exists in a form permitting convenient examination.

In the following States, as will appear by the references appended,—which I have endeavored to make full and precise,—the bonds, or stocks, of other States, and of cities and counties in other States, owned by residents of the respective States, are, either by express designation, or under the broader, but equally definite name of public securities, required to be valued to the owner thereof in the State in which he resides. *Arkansas*, Digest of Stat., 1874, ch. 116, sec. 5047, p. 885. *Delaware*, Revised Code of 1852, as amended in 1874, pp. 53, 54, vol. 14 Laws, ch. 22. *Georgia*, Code of 1873, sec. 801, p. 142. *Indiana*, Stats. 1876, vol. 1, ch. 22, sec. 3, p. 73. *Iowa*, Rev. Code 1880, sec. 801, p. 194. *Kansas*, Stats. 1876, vol. 2, sec. 2, pp. 1006, 1009. *Maine*, Rev. Stats. 1871, Tit. 1, ch. 6, sec, 5, p. 129. *Massachusetts*, Gen. Stats. 1860, ch. 11, sec. 4, p. 74. *Michigan*, Compiled Laws, 1871, vol. 1,

ch. 21, sec. 3, pp. 359, 360. *Minnesota*, Gen. Stats. 1878, ch. 11, sec. 1, p. 211. *Mississippi*, 1880, ch. 10, sec. 468, p. 151, sec. 474, p. 153. *Missouri*, Rev. Stats. 1879, vol. 2, ch. 145, sec. 6664, p. 1306. *Nebraska*, Gen. Stats. 1873, ch. 66, sec. 2, p. 897. *New Hampshire*, General Laws, 1878, Tit. 8, ch. 53, sec. 6, p. 139. *New York*, Saxton's Tax Laws, 1880, p. 31, Rev. Stat., 6th Ed., p, 932. *North Carolina*, Battle's Revisal, 1873, ch. 102. sec. 9, sub-sec. 5, p. 760. *New Jersey*, Revision, 1877, p. 1151, par. 63. *Ohio*, Rev. Stats. 1880, vol. 1, Tit. 13, ch. 1, sec. 2730, p. 706. *Oregon*, Gen. Laws, 1843–1872, ch. 57, Tit. 1, sec. 1, p. 748. *Pennsylvania*, 2 Brightly's Purdon's Dig., 1872, p. 1386. sec. 170. *Rhode Island*, Gen Stats. 1872, Tit. 8, ch. 39, sec. 10. p. 104. *Tennessee*, Acts of 1879. ch. 221, p. 264. *Texas*, Rev. Stats. 1879, Tit. 95, ch. 2, Art. 4671, p. 679. *Vermont*, Gen. Stats., 1862, Tit. 26, ch. 83, sec. 4. p. 516. *West Virginia*, Revised Stats. 1879, ch. 186, sec. 47, p. 1071. *Virginia*, Code, 1873, Tit. 12, ch. 123, sec. 49.

In the following States such properties are certainly taxable, when so owned, under the general language of the taxing laws of such States. *Alabama*, Code, 1876, Tit. 7, Art. 3, sec. 362, p. 258; Art. 2, sec. 2. *Connecticut*, Revision of 1875, Tit. 12, ch. 1, sec. 14, p. 156. *Illinois*, Rev. Stat., 1880, ch. 120, sec. 1, p. 868. *Wisconsin*, 1878, Tit. 13, ch. 48, sec. 1034, p. 264.

If these citations did not dispose of the usage relied on, the case of the plaintiff in error would not be mended. Usage, when it exists, may be altered by the terms of positive law. *Hammerton vs. Honey*, 24 Weekly Rep., 603, 604, Jessel, M. R. *Walker vs. Transportation Co.*, 3 Wall., 155. *Brown vs. Jackson*, 2 Wash. C. C. Rep., 25.

Foley & Woodside vs. Mason, 6 Md., 49, 50. *Appleman vs. Fisher*, 34 Md., 553. I have already shown that such usage, if it ever existed in Maryland, was changed, long since, by the terms of the positive law of that State.

The usage, which would enable an indebted State to hold out to citizens of other States, who might purchase its securities, immunity of the property thus acquired from taxation by the States of which they were citizens, would be fraught with injury to such other States.

I have referred to the magnitude of the issues involved in this case. If the rule,—*Mobilia sequuntur personam*,—which I have insisted upon as the rule which must determine this controversy, can be regarded only as a fiction of law, it is certainly necessary for the purposes of justice, in matters of taxation, that the fiction should be maintained, in order that the vast and widely diffused sum of wealth represented by the debts of States, counties, townships, school districts, cities and municipalities to which I have referred, should be taxed in the hands of its possessors by the States in which such possessors respectively reside.

Green vs. Van Buskirk, 7 Wall., 150.

I submit, in conclusion, that it is immaterial whether securities, issued by another State, or by a municipality, incorporated by another State, and owned by a resident of Maryland, were or were not exempted from taxation by the State which authorized the issue of such securities. Such exemption can have no extra-territorial operation, 103 U. S., 630, 631, except by general usage, or by a comity, which had attained the force of general usage; and there is no usage, or comity, having the force of usage, which will accord, under the Act of 1876, chapter 260, exemption

from taxation in Maryland to securities owned by residents of Maryland, because such securities were exempted from taxation by the State which authorized their issue.

There is, of course, no need of any argument to show that securities, issued by other States, or by municipal or other corporations incorporated by other States, are not exonerated from taxation in Maryland, because such securities are not taxed in such other States, under their general laws, when owned by residents of such other States. Each State is free, in the absence of a constitutional provision to the contrary, to exempt from taxation any class of property, belonging to residents of such State, to which it may see proper to grant such immunity. The power thus exercised can never operate beyond the jurisdiction of the State exercising it. No State can, by its legislation, protect from taxation property within the jurisdiction of another State, owned by a resident of such other State.

CHARLES J. M. GWINN,
Attorney General of Maryland,
for the Defendant in Error.

Baltimore, Md., October, 1881.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 165.

HOBART C. DUGGER AND ALICE V. SPRAGUE, BY HER HUSBAND, MYRON T. SPRAGUE, PLAINTIFFS IN ERROR,

vs.

WILLIS P. BOCOCK, HENRY A. TAYLOE, ROBERT L. MAUPIN, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED MARCH 6, 1879.

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1 Transcript of the record and proceedings of a certain cause lately pending in the supreme court of Alabama, by appeal from the chancery court of Hale County, in said State, wherein Hobart C. Dugger et als. were appellants and Willis P. Bocock et als. were appellees; which said record was filed in said supreme court on the 18th day of January, A. D. 1875.

To the honorable A. W. Dillard, chancellor of the western chancery division of the State of Alabama.

The bill of complaint of Hobart C. Dugger and Alice V. Sprague, who sues by her husband and next friend Myron T. Sprague, who are all of the county of Mobile and State of Alabama, filed in the chancery court of the ninth district of the western chancery division of the State of Alabama, against Willis P. Bocock and Henry A. Tayloe, of the county of Hale; Robert L. Maupin, of the county of Marengo and State of Alabama; and against Alice G. Dugger, individually and as administratrix of Henry Dugger, deceased, and as administratrix of John W. Dugger, deceased, and as guardian of your orator and oratrix, and against
2 William Waverly Dugger, Reuben H. Dugger, and Luke W. Dugger, all of said county of Hale and State of Alabama, your orator and oratrix and all of said defendants being now over twenty-one years of age.

I. Your orator and oratrix, humbly complaining, respectfully show unto your honor that Henry Dugger, deceased, late of said county of Marengo, but of that portion of that county which has become by law a part of the said county of Hale, died in the year 1852 intestate, leaving him surviving said Alice G. Dugger, who is his widow and administratrix, and the following children, who were his heirs-at law, to wit: Henry B. Dugger, John W. Dugger, William W. Dugger, Frederick E. Dugger, Reuben H. Dugger, L. White Dugger, your orator and oratrix, who are now of full age, and whose residences are above set forth; that said Henry B. Dugger, who was the son by the first marriage of said Henry Dugger, deceased, and who, during his lifetime and after he was of full age, and after the death of his father, and about ten years before the final settlement of said Alice G. Dugger as administratrix of said Henry Dugger, deceased, did by deed convey to said Alice G.
3 Dugger, all his interest of every kind and description in his said father's estate, and she is now the owner of the same; that said Henry B. Dugger and his wife, on the twenty-second of September, 1859, also conveyed by deed all their interest in John W. Dugger's estate, who died after his father's death, to said William W. Dugger, who is now the owner of the same, and that said Henry B. Dugger died intestate in the year 1866; that John W. Dugger died intestate in 1855, leaving no widow or children, and that Alice G. Dugger is administratrix of his estate, which said administration has never been settled by her, but there are no debts against his estate, and no reason exists against your orator's and oratrix's being decreed their share of the land money arising from the one hundred and ninety-six acres mentioned and set forth in this bill; that said Frederick E. Dugger, who was never married, died in July, 1864, leaving no children, but who left a last will, duly attested, but which has never been probated, by which he bequeathed his whole estate to his mother, the said Alice G. Dugger, and to the validity of which your orator and oratrix assent.

II. Your orator and oratrix, further complaining, show unto
4 your honor that said Henry Dugger, the said ancestor, died seized

and possessed, along with other lands, of the following lands then lying and being in the county of Marengo, but now in the new county of Hale, to wit, the southeast quarter of section thirty, and all of section thirty-one, lying north of the Selma & Meridian Railroad, all in township eighteen of range four east, containing one hundred and ninety-six acres, more or less, and which descended along with his other lands to his said heirs-at-law.

III. That said Alice G. Dugger, by contract, was not entitled to dower in her said husband's estate, and has never claimed any, but waives all claim to dower.

IV. That said Alice G. Dugger was administratrix of said Henry Dugger's estate, and as such, on the third day of September, 1860, filed her petition in the probate court of Marengo County, from which her letters of said administration were derived, praying the order of said court to sell said lands, together with all the other lands of said decedent, for distribution, the said estate being then free from debt; and on the twenty second of October, 1860, said court ordered said lands to be so sold, and, on the nineteenth day of November, 1860, she so sold the same,
5 and Willis P. Bocock became the purchaser of the whole of the lands belonging to said estate, including the land hereinbefore specifically named, at the price of forty-two and $\frac{01}{100}$ dollars per acre, on a credit of one, two, and three years, with interest from date of sale. The said lands so sold and purchased by said Bocock amounted altogether to six hundred and forty (640) acres, more or less, his bid amounting in the ag'regate to the sum of twenty-eight thousand eight hundred and six & $\frac{40}{100}$ dollars ($28,806.40), for which he executed his three notes, with F. S. Lyon and H. W. Reese as sureties, all payable to Alice G. Dugger, as administratrix of said Henry Dugger, deceased, and dated November the nineteenth, 1860, one for ten thousand three hundred and seventy & $\frac{30}{100}$ dollars, payable the nineteenth day of November, 1861, one for eleven thousand one hundred and thirty-eight & $\frac{47}{100}$ dollars, payable the nineteenth day of November, 1862, and one for eleven thousand nine hundred and six & $\frac{64}{100}$ dollars, payable the nineteenth day of November, 1863, interest being included in the face of the notes; and said sale was reported by said Alice G. Dugger to said probate court on the twelfth day of January, 1861, and was confirmed at the April term, 1861,
6 of said court; but no deed was made to the purchaser until some time thereafter, as hereinafter set forth.

V. Your orator and oratrix show to your honor that although said Willis P. Bocock was the ostensible purchaser of the whole of said land, yet by some arrangement between him and said Henry A. Tayloe, made before or at the time of said purchase, said Tayloe obtained, by the understanding with Bocock, the one hundred and ninety-six (196) acres before mentioned, and undertook, with said Bocock, to pay the purchase-money for the same at the rate aforesaid, and said Tayloe went into and has since had the possession thereof. That said Maupin, for some years past having resided on the land with said Tayloe, as part of his family, has participated with said Tayloe in the occupation of and planting on the same; but your orator and oratrix do not know upon what terms said Maupin participated with said Tayloe in the possession of said lands.

VI. Your orator and oratrix further show to your honor that neither said Bocock nor any one else has ever paid the purchase-money evidenced by said notes, or any part thereof, according to terms of his pur-
7 chase, or in any manner, except as hereinafter stated, and the pur-

chase-money for said one hundred and ninety-six acres, with interest thereon, remains wholly unpaid.

VII. That said Bocock took up the said two notes first falling due with Confederate States treasury notes, and the said note last falling due he took up by handing over to Mrs. Alice G. Dugger bonds of the Confederate States. Your orator and oratrix, who were then infants, state, upon information and belief, that Bocock and the defendant Henry A. Tayloe together urged said Alice G. Dugger to accept said Confederate notes and bonds in payment of said Bocock's notes, at a time when all of her children who were of age were absent from home, and the said Alice G. Dugger received such Confederate notes for the note first falling due without remonstrance; she reluctantly yielded and received the Confederate notes for the note secondly falling due; but when they urged her to accept the said treasury notes or Confederate bonds for the last note, she peremptorily refused to accept said Confederate notes and bonds, which were then really almost worthless, in payment of
8 said note, and for a long time she continued to refuse, and sent the said Bocock and Tayloe away without taking the offer; but she had great confidence in and esteem for said Bocock and Tayloe, who were her neighbors, and were men of high character, and they brought great pressure to bear on her to induce her to take the Confederate notes or bonds. They represented to her that she would be ruinously taxed by the Confederate Government if she refused to take Confederate money in payment of said note, and that she would be made to pay the tax in gold, and they or one of them reported her refusal to the Confederate tax-collector, who called upon her and told her he was informed of her refusal, and, finally, under great pressure, under protest, and unwillingly, the said Alice G. Dugger very reluctantly yielded and took said Confederate bonds and gave up to said Bocock said last note. The sons of said Alice G. Dugger then of age were absent in the army.

VIII. That said Alice G. Dugger never would and never did report to said probate court of Marengo County that the purchase-money for said lands so sold by her as administratrix aforesaid had been paid, but purposely abstained from so doing; and shortly after the war ended
9 your orator and oratrix, then infants, with the other heirs-at-law of said Henry Dugger, deceased, and said Alice G. Dugger, brought their action at law, in the nature of an action of ejectment, to recover said six hundred and forty acres of land; and anticipating that said Bocock would make some effort to obtain a conveyance of said lands from said probate court, your orator and oratrix, with said William W. and Luke W. Dugger, filed their protest or caveat in said court, on the twelvth day of May, 1866, protesting against and objecting to any confirmation of the said sale or order to make titles, on the ground that the sale was without any valid or lawful order of said court, and that sale was unauthorized and void, and that the entire purchase money had never been lawfully paid; a copy of which protest is hereto appended, marked Exhibit A, and complainants pray that it be taken as a part of this bill. Said caveat or protest is also filed in the name of Frederick E. Dugger, who was then dead, but his name was inserted by mistake for that of Reuben H. Dugger by the attorney who was conducting for the plaintiffs said suit, he not being familiarly acquainted with the parties plaintiffs.

10 IX. Your orator and oratrix, further complaining, show unto your honor that said Bocock, after the filing of said protest or caveat *and while said action filing of said protest or caveat*, and while said action was pending in the circuit court in and for said county of

Marengo, by the heirs-at-law of said Henry Dugger, deceased, and Alice G. Dugger, as the purchaser of the interest of one of said heirs against said Bocock and Tayloe, did, for the express purpose of defeating said action at law, on the twenty-first day of March, 1868, file his petition in said probate court, a copy whereof is hereto attached, marked Exhibit B, as a part of this bill, wherein he represented and stated that he had paid the whole purchase money for said lands, when in fact he had never paid it or any part thereof otherwise than in Confederate States treasury notes and bonds, as already herein set forth in detail, and further setting forth in his petition that the said Alice G. Dugger had not reported such payment, though more than a reasonable time had elapsed for her to have done so, and praying that an order for a conveyance of said lands to him might be made; and said probate court, notwithstanding said caveat and protest filed by the heirs-at-law of said Henry Dugger, deceased, long before that time, and which was then on file, and without notice to the administratrix or to any of the said heirs, and without the knowledge by them of said application, and upon ex parte proof made by said Bocock, did appoint Henry A Woolf, a brother of the judge of said court and an entire stranger to the estate, having no interest therein or knowledge of the affairs thereof, to execute titles to said Bocock, and said Woolf, in compliance with said order and decree of said court, made conveyances of said lands to said Bocock, without notice to or knowledge by the administratrix. Said petition of Bocock was filed and said decree for titles to him was rendered in vacation and on Friday, when there was no regular or adjourned term of said probate court. The decree was rendered on the same day the petition for titles was filed, and your orator and oratrix insist that said decree for titles is void. And said proceedings were had without notice to or knowledge by the said heirs-at-law, or to their counsel, William M. Brooks, esq., whose name was endorsed on the caveat filed by him as their attorney of record, of any of said proceedings; and the said action in the nature of ejectment brought by said heirs was defeated by the production of said conveyance, on the ground that the remedy was by direct proceedings in chancery to impeach said order or decree.

11

12

X. Your orator and oratrix further show that after said Bocock had obtained said conveyance, to wit, on the eleventh day of June, 1868, he and the said Alice G. Dugger, William Waverly Dugger, Reuben H. Dugger, Luke W. Dugger, and your orator and oratrix, who were then infants, entered into a compromise respecting so much of said land as was embraced by said sale, except the one hundred and ninety-six (196) acres sought to be subjected by this bill, and of the money due therefor, a copy of which contract is hereto appended and made a part of this bill, marked Exhibit C; and your orator and oratrix have since they became of age ratified and do ratify said compromise, but the rights of your orator and oratrix respecting said one hundred and ninety-six acres are not touched by said agreement, but are expressly excepted therefrom, and upon effecting said compromise said action was restricted to said one hundred and ninety-six acres.

13

XI. Your orator and oratrix further show unto your honor that at the April term, 1864, of the probate court of Marengo County, said Alice G. Dugger made what purports to be a final settlement of her administration of the estate of said Henry Dugger, deceased, and charged he'self, or was charged, with the whole of the purchase money of said six hundred and forty acres of land as so much lawful money, and it nowhere appears in the record of said settlement that she had

only taken Confederate notes and bonds. On said pretended final settlement she was charged with a balance of forty thousand one hundred and seventy & $\frac{40}{100}$ dollars, after due credit for all debts of the estate, which she in fact had paid before said sale, and for all costs, charges, and expenses of administration, leaving that sum net for distribution among the heirs; and the decree of said court, a copy of which is hereto attached, marked Exhibit D, as a part of this bill, recites that
14 the distribution share of each of said heirs and distributees is one-eighth of said sum, which said sum of forty thousand one hundred and seventy & $\frac{40}{100}$ dollars is, to the extent of thirty-seven thousand two hundred and twenty $\frac{14}{100}$ dollars, composed of the said land money, and the sum of three thousand eight hundred and four & $\frac{72}{100}$ dollars interest thereon to the time of said pretended settlement charged against said administratrix.

XII. That said decree further recites that said Henry B. Dugger, deceased, in his lifetime, had transferred his interest in the estate to said Alice G. Dugger, and the decree authorized the said Alice G. Dugger to retain his share for herself as so transferred. It further recites that John W. Dugger had since died, and that said Alice G. Dugger was then his administratrix and had charged herself as such with his distributive share; but your orator and oratrix, who are distributees of their deceased brother John W. Dugger, say that she in fact never received said sum, and the said decree does not in fact charge her with it. Said Luke W., Reuben H., Frederick E., and William W. Dugger were of full age when said decree was made, and, as your orator and
15 oratrix are informed and believe, and on such information and belief state, did not question but abided by said decree, nor have they claimed or received anything thereunder; but your orator and oratrix were then infants, and do not consent to the abandonment of their rights to the purchase money of said one hundred and ninety-six acres of said land, or to look to their mother therefor, to the exoneration of said land.

Said decree further recites that said Alice G. Dugger was then guardian of your orator and oratrix, Hobart C. and Alice, who were then minors, and had charged herself as such with their respective shares, but she never in fact received said sums, and no final decree is rendered in her favor as their guardian against her as administratrix for said sums, and your orator and oratrix insist that said decree was not final as to their rights, the decree merely reciting that it appears by reference to her accounts as guardian that she had charged herself as such guardian with said sums.

XIII. That your orator and oratrix have never sought to en-
16 force said decree against said Alice G. Dugger, and she and her sureties are unable to respond to the same; and your orator and oratrix further say that they never assented to the receipt of said Confederate notes and bonds and never received them or any part thereof, and have derived no benefit therefrom; that your orator and oratrix were minors when said decree was rendered.

XIV. That the said Alice G. Dugger, and the sureties on her bond, as guardian of your orator and oratrix, are unable to respond to said decree.

XV. Your orator and oratrix further show that upon the sale by said administratrix of said six hundred and forty acres of land, said Bocock and Tayloe each went into possession of his portion of the same, said Tayloe going into possession of said one hundred and ninety-six acres, and said Bocock of the remainder of said six hundred and forty acres,

and said Tayloe's possession has since been retained by him alone or in conjunction with said Maupin. Your orator and oratrix have but imperfect knowledge or information of the exact arrangement by which said Tayloe obtained the same, or whether he has the same in his own name or in the name of some other person, and pray that said
17 Bocock and Tayloe and Maupin may answer and set forth how and in what manner the same was acquired and is held by them, or either of them, and also what said Tayloe and Maupin, and each of them, paid for it, and in what sort of money or currency; and your orator and oratrix state upon information and belief that the Confederate currency and bonds with which said Bocock took up his notes was furnished by said Tayloe to the amount of the purchase money for said one hundred and ninety-six acres, and that said payment, though made in Bocock's name, was in full to the extent of the amount due for said one hundred and ninety-six acres made in part by said Tayloe.

XVI. Your orator and oratrix charge that said Tayloe paid nothing for said land except Confederate money and bonds, which were not a valuable consideration as against your orator and oratrix, who were then minors, and they further say that said Tayloe well knew that said Bocock had paid only Confederate notes and bonds for said lands, and on information and belief they charge that he participated with said Bocock in said wrong and injury to your orator and oratrix. And
18 your orator and oratrix show that said Maupin is the son-in-law of said Tayloe, and lives with him, that he married the daughter of said Tayloe in 1864 or 1865, and that he has no title to said land, and is not a purchaser for value, and that he acquired whatsoever rights he may have with full knowledge or notice that nothing but Confederate notes and bonds had been paid for said land.

XVII. And your orator and oratrix further show to your honor that said lands are wholly insufficient to pay the sums due them, and that said Tayloe is insolvent, and that the application of the rents and profits to the demands of your orator and oratrix is necessary for their security.

To the end therefore that an account may be taken of the amount due to your orator and oratrix, respectively, as their several portions of money arising from the sale of said one hundred and ninety-six acres of land, as heirs-at-law of said Henry Dugger, deceased, and as heirs at-law of said John W. Dugger, deceased, and that payment of the same may be enforced against said one hundred and ninety six acres of land, and against the rents thereof, to accrue from the filing of this bill, and that said lands may be so sold therefor, and that the decree for titles to
19 said Bocock, and the deed made thereto, may be held void, or, if not, that it may be set aside, or held to be subordinate to your orator's and oratrix's lien, and that your orator and oratrix may have such other and further relief as to your honor may seem proper and as justice may require, and that the said defendants may show why your orator and oratrix should not have the relief hereby prayed, and may respectively, and according to the best and utmost of their respective knowledge, remembrance, and belief, full, true, direct, and perfect answers make to such of the statements of the foregoing bill as by the note hereunder written they are respectively required to answer. may it please your honor to grant unto your orator and oratrix writs of subpœnas, issuing out of and returnable into said chance'y court for said county of Hale, addressed to and to be served on each of said defendants, to wit, Willis P. Bocock, Henry A. Tayloe, Robert L. Maupin, Alice G. Dugger, individually and as administratrix of the estate of Henry Dugger, deceased, and as administratrix of the estate of John

W. Dugger, deceased, and as guardian of your orator and oratrix, William W. Dugger, Reuben H. Dugger, and Luke W. Dugger, commanding them and each of them to answer this bill, as required by law, but
20 not under oath; and, further, to stand to, and abide by, and perform such orders and decrees as shall be made. And your orator and oratrix will ever pray, &c.

SMITH & ROULHAC,
Sol's for Compl'ts.

NOTE.—Each of defendants to the foregoing bill are required to answer each paragraph of this bill from I to XVII, both inclusive, but not under oath, their oaths being expressly waived.

SMITH & ROULHAC,
Sol's for Complainants.

A.

Records No. 6, pag' 575.

To the honorable the judge of the probate court in and for the county of Marengo and State of Ala.

We, William W. Dugger, Frederick E. Dugger, L. White Dugger, Alice V. Dugger, and Hobart Cobbs Dugger, heirs-at-law of Henry Dugger, late of the county aforesaid, deceased, respectfully state that certain land in said county belonging to the said deceased at the time of his death were heretofore sold to W. P. Bocock, of said county, under and by virtue of certain pretended decrees and orders of your hon'l' co't. Now we are informed and believe, and therefore say, that the said land was sold without any lawful or valid order or decree of said court, and that the sale thereof was unauthorized and void, and that the entire purchase money for said land has never been lawfully paid.

21 In consideration whereof we respectfully object to any order being made requiring a deed to be made to the purchaser, and require notice of any application made to confirm said sale or for a deed, &c.

WM. M. BROOKS,
Att'y for said W. W. Dugger & others.

Filed in court May 12th, '66.

S. B. JACKSON, *Judge.*

FRIDAY, *March 21st*, 1868.

B.

Est. Henry Dugger, dec'd.

This day came W. P. Bocock and filed in court his application for an order of this court to convey titles to the following-described real estate sold under the order and decree of this court, made on the 22nd day of Oct., A. D. 1860, belonging to the estate of said Henry Dugger, deceased, and purchased at the sale thereof by the said W. P. Bocock, as is fully set forth in the record and proceedings heretofore had in this court, as appears of record, to wit, the N. ½ of S. W. ¼ of sect. 31, S. E. ¼ of sect. 30, all in township 18, range 4 east, and it now appearing fully to the satisfaction of the court, by proof, that all of the purchase money for said lands has been fully paid by the said W. P. Bocock, the purchaser thereof as aforesaid, it is therefore ordered and de-
22 creed by the court that said application be granted, and that Henry A. Woolf, esq'r, be, and he is hereby, fully authorized, empowered, and required to execute to the said W. P. Bocock, the purchaser

of said land, a conveyance *conveyance* conveying to him all the right, title, and interest of which the said Henry Dugger was seized and possessed at the time of his death in and to said lands above described, as set forth in the order and proceedings, heretofore had in this case in this court, as appears to us of record. It is further ordered that said W. P. Bocock pay the costs of this proceeding, and for which let execution issue.

And it is further ordered that said petition filed in this proceeding be recorded, and the same is in words & figures as follows, to wit:

To the honorable the judge of probate of the county of Marengo:

The petition of Willis P. Bocock respectfully represents to your honor that said court did, by its order made in the matter of the estate of the late Henry Dugger, dec'd. on the 22nd day of Oct., 1860, and delivered to the adm'r'x, authorize and direct the sale by Alice G. Dugger, the administratrix of said estate, of certain lands which had belonged to
23 said dec'd't at the time of his death, to wit, the N. ½ & S. W. ¼ of sect. 31, and the S. E. ¼ of sect. 30, all in township 18, range 4 east, in the said county of Marengo, at which sale your petitioner became the purchaser of said lands, as will appear by the report of said sale filed in this court by the said adm'r'x, and by the order of this court made in said report, confirming said sale to your petitioner, which order of confirmation bears date the 2nd Monday of April, 1861.

Your petitioner further states that he has fully complied with all the terms and conditions of said sale which were or are obligatory on him, and that he has paid the whole of the purchase money for his said purchase, as fully appears by the three notes which he executed for the three installments of said purchase-money, which notes he has taken in and now has in his possession, with the receipt of said administratrix endorsed on each, but though more than a reasonable time has elapsed since the last of said payments, yet it appears, and your petitioner is informed, that said administratrix has hitherto wholly failed to make report of said payments to your honor so that a conveyance of the premises might be ordered by this court to be made to your petitioner as provided by law.

24 In consideration of all of which your petitioner prays your honor to order a conveyance to be made to your petitioner by such other person as this court may appoint, conveying all right, title, and interest which the said Henry Dugger, dec'd, had in said lands at the time of his death. And as in duty bound, &c.

WILLIS P. BOCOCK.

Sworn to and subscribed before me, Mar. 21, 1868.

THOS. J. WOOLF, *Judge.*

C.

This agreement, made and entered into this the eleventh day of June, in the year 1868, by and between Willis P. Bocock, of the first part, and Alice G. Dugger, W. Waverly Dugger, Reuben H. Dugger, L. White Dugger, Alice V. Dugger, and Hobart C. Dugger, parties of the second part, witnesseth:

That in full and final compromise and settlement of the claims between the parties aforesaid touching and concerning their claims and rights in and to the lands hereinafter mentioned, and of the suits between them in respect thereto, and of the damages, rents, and mesne profits, the said parties of the second part hereby agree to

execute a deed and thereby grant and convey unto the
25 said party of the first part a good title in fee simple to a certain parcel of land described as the southwest quarter of section 31, in township 18, range 4, and three-eighth's (⅜) of the north half of the same section, to be taken off of the southern part of said half section by a line running east and west across the entire section, and all situate and being in the county of Hale and State of Alabama. And the said Willis P. Bocock, the party of the first part, agrees to execute, together with his wife, a deed of conveyance, and thereby release and forever relinquish to the parties of the second part all right, title, and claim of himself and wife in and to the residue of said north half of section 31, saving and excepting so much thereof as lies north of the Selma and Meridian Railroad, which is claimed by me, Henry A. Tayloe, and amounts to thirty-six $\frac{45}{100}$ acres or thereabouts. But the said party of the first part is to retain possession of the said land free of rent until the first day of January next, or until the crop growing thereon shall be gathered; and said party of the first part further agrees to pay to the said Alice G. Dugger the sum of two thousand dollars for the benefit of the parties of the second part.

26 And the said party of the first part is hereby discharged from any and all claims which the parties of the second part, or any or either of them, may have against him for any use and occupation of or trespass to any lands ever owned by the parties of the second part, or either of them, whether the same were used and occupied by him or by any other person; but nothing herein contained shall in any manner impair or effect any right, title, or claim of any or either of the parties of the second part to any lands in the possession of said Henry A. Tayloe, or to rents and damages for the use thereof by said Tayloe, or to any action pending against said Tayloe.

And Alice V. Dugger and Hobart C. Dugger being minors under the age of twenty-one years, the parties of the second part further covenant and agree the said infants shall, as they respectively become of age, or within a reasonable time thereafter, fully ratify and confirm any deed by them, or either of them, made under this agreement.

And it is hereby further stipulated and agreed by and between all the parties aforesaid that the lands which are to be conveyed as aforesaid
27 by the party of the first part and his wife shall remain bound for the fulfilment of the several matters and things to be done and performed by the parties of the second part, or any or either of them, and the party of the first part shall and he hereby retains a lien thereon for his indemnity, notwithstanding any deed he may execute in relation thereto.

In testimony whereof the parties aforesaid have hereto set their respective hands and seals.

(Signed by)

A. G. DUGGER,
W. W. DUGGER,
R. H. DUGGER,
L. W. DUGGER,
A. V. DUGGER,
H. C. DUGGER,
W. P. BOCOCK.

& witnessed by—
PETER C. JAMES &
WM. M. BROOKS.

& by—
W. E. CLARKE, to signature of W. P. Bocock.

The foregoing believed to be a correct copy of the contract now in my possession.

W. P. BOCOCK.

JULY 25, 1872.

D.

Estate of Henry Dugger in ac't with Alice G. Dugger, adm'r'x.

1860.				
1. May 5.	To am't p'd B. J. Duncan (shoes)		80 25	
	int. to April 11th		25 20	
1861.				
2. Apr. 5.	" am't p'd ac't T. H. Walker		12 51	
	interest		3 24	
1860.				
3. Ap'l 17.	" am't p'd Walkington & Co.		186 74	
28	To interest		59 50	
1861.				
3. Ap'l 17.	" am't p'd J. N. Steel		4 50	
38	" in't		1 10	
1860.				
5. Oct. 11.	" am't p'd McLure & Thames (bacon)		129 07	
	" interest		36 15	
6. Ap'l 18.	" am't p'd W. Sayre & Co. (groceries)		80 77	
	" interest		25 70	
7. Ap'l 19.	" am't p'd C. Kayser (hat)		10 50	
	" interest		3 33	
8. Dec. 31.	" am't p'd overseer's wages (Casey)		412 50	
	" interest		108 15	
9. Aug. 13.	" am't p'd sheriff, suit of Wm. Steed for part of Gray's wages, overseer, 1859		222 42	
	" interest		65 22	
1861.				
10. Jan'y 14.	" am't p'd A. J. Crawford, taxes (1860)		112 57	
	" interest		29 26	
1860.				
11. July 31.	" am't p'd A. McDowell (surveying)		3 33	
	" interest		95	
12. 1.	" bagging & rope (see Saunders' acc't & freight on the same incurred		137 16	
	" interest		41 50	
13.	" medical acc't Dr. R. H. Dugger (1860)		72 50	
	" interest		18 78	
	To am't bro't forward			1,872 90
1863.				
14. Jan. 20.	" am't p'd Robertson & Pickens		12 94	
	int		1 20	
1861.				
15. May 11.	" am't p'd adv. sales Canebrake Gazette		9 00	
	" interest		3 00	

1862.				
19. Oct. 25.	" am't p'd B. H. Mason's acc't		16 96	
	" interest		1 96	
1863.				
20. Feb. 8.	" am't p'd Cornish's acc't		71 07	
	" interest		7 10	
1861.				
21. Mar. 15.	" am't p'd auctioneer fee (adm. sale)		25 00	
	" interest		6 13	
29 1860.				
22. Aug. 1.	To am't p'd S. Wheeler		78 00	
	" interes'		22 34	
1862.				
23. Feb. 25.	To am't taxes (y'r 1861, State & county)		122 50	
	" int.		20 82	
1864.				
24. Jan'y 27.	" am't p'd war tax		252 00	
	" interest		4 20	
1860.				
D. Ap' 9.	" am't p'd Judge Young, court costs 59 & 60		67 50	
	" interest		21 60	
1858.				
25. June 25.	" am't p'd Judge Young, court costs, y'r '58		50 25	
	interest		23 16	
1864.				
26. Feb'y 16.	" State & county tax for y'r 1863		53 00	
	interes'		60	
	" 2½ p. c. com's on am't rec'd, 45,403.00		1,135 00	
	" " " " " " " disb's, 2., 753.28		68 83	
	" " " " " " "	1,033 01		
	" printer's fees		8 00	
	court costs		125 50	
				3,259 69
				5,132 59

Estate of Henry Dugger in acc't with Alice G. Dugger, adm'r'x.

By am't cotton crop 1860—62 bales; see Saunders' letters	2,680 00
By int. from April 21, '61, 8 c't	643 20
By hire of Jim Carpenter from W. W. Dugger	350 00
By bal. hire of Clasborne, not in last acc't	35 00
By am't rec'd from Drover (fodder)	20 50
By am't rec'd from Jno. Grund, for cattle	30 00
By am't rec'd from Alf Brestling	22 00
By am't rec'd from Greer, corn	100 00
By am't rec'd for Hobart's ox	15 00
By corn from plantation, fall of 1860, 400 bu., @ 75c	300 00
By am't acc't sales under order probate court	2,385 45
By int. to April 11, '64	647 71

30 1861.

Due by am't sale of *sale* of lands under order of court for distribution, 3 notes	10,370 30⅛ 11,138 47⅛ 11,906 64⅛
By int. on entire am'ts to Ap'l 11, '64—No. 1, 2,186.45 ; No. 2, 1,242.54 ; No. 3,375.73	3,804 72
By am't rec'd from Thos. S. Gholson on ac't of coal mine share sold in Va., belonging to est. of H. Dugger	954 00
	45,403 06
Deduct payments, com's, &c., from 3d page	5,132 59
Bal. in favor of est. car'd down	40,270 41
Deduct am't allow'd for att'ys fees	100 00
	$40,170 41

Am't of distributive shares.

1. In favor of Mrs A. G. Dugger, of H. B. Dugger	5,021 30⅛
2. " " " Mrs. A. G. Dugger, and'r J. W. Dugger	5,021 30⅛
3. " " W. W. Dugger	5,021 30⅛
4. " " R. H. Dugger	5,021 30⅛
5. " " F. E. Dugger	5,021 30⅛
6. " " L. W. Dugger	5,021 30⅛
7. " " A. V. Dugger	5,021 30⅛
8. " " H. C. Dugger	5,021 30⅛
	$40,170 41

Said adm'rx says she has received no other am'ts for est. than those above stated, nor used said am'ts for any longer time.

ALICE G. DUGGER.

STATE OF ALA.
Marengo Co.:

Personally came Alice G. Dugger, and on oath says the above acc't is correct as stated.

HENRY A. TAYLOE, *J. P.*

THE STATE OF ALABAMA,
Marengo County:

I, R. L. Maupin, judge of the probate court in and for said
31 county, hereby certify that the foregoing is a true and correct transcript of the acc't of Alice G. Dugger, adm'r'x of Henry Dugger, dec'd, as stated and audited and filed as a final settlement of her adminstration of said state. Given under my hand, at office in Linden, this 15th day of May, A. D. 1873.

R. L. MAUPIN,
Judge Probate Court Marengo County.

STATE OF ALABAMA,
Marengo County:

Probate court. April term, A. D. 1864.

In the matter of the final settlement of the estate Henry Dugger, dec'd

It further appears that letters of ga... to said Alice G. Dugger upon the estate of the aforesaid Reuben H.

ger and Hobart C. Dugger, minor heirs of said deceased, by H. A. Woolf, esq., and the account and vouchers of said administratrix heretofore filed for final settlement of said estate coming on this day to be heard, and the same being by the court audited and settled:

It appears to the satisfaction of the court that notice of the time and place of said settlement has been given by publication for three successive weeks in the Linden Jeffersonian, a newspaper published in the said county. It further appears that said Henry Dugger died intestate, leaving the following named persons his heirs-at-law, to wit:

32 1st, H. B. Dugger, who is over 21 years old, and who has transferred and assigned his interest in said estate to said Alice G. Dugger; 2nd, John W. Dugger, who has since died and upon whose estate letters of administration have been granted to said A. G. Dugger; 3rd, Waverly W. Dugger, who is over 21 years; 4th, Reuben H. Dugger, who is over twenty-one years of age; 5th, Frederick E. Dugger, who is over 21 years old; 6th, Luke W. Dugger, who is over twenty-one years of age; 7th, Alice V. Dugger, who is under twenty-one years of age; and 8th, Hobart C. Dugger, who is under twenty-one years of age.

It further appears that said Alice G. Dugger, under and by virtue of a deed of settlement between her and the said Henry Dugger, dec'd, executed in his lifetime, relinquished all her claim against his estate to dower or distribution thereof, and is entitled to no part of his estate either real or personal.

It further appears, from the account and vouchers now here before the court as stated, that after charging said administratrix with all wherewith she is properly chargeable, as well from the real estate as from the personal estate, and allowing her all just credits for payments, commissions, and expenses of administration, there remains a bal-

33 ance in the general account against her of forty thousand one hundred and seventy $\frac{41}{100}$ dollars, subject to distribution among the aforesaid distributees, the share of each one of said distributees being one-eighth, or five thousand and twenty-one $\frac{30}{100}$ dollars. It is therefore adjudged, ordered, and decreed by the court that said account and vouchers, as stated by the court as aforesaid, be passed and allowed and be recorded as a full and final settlement of said estate.

It further appears that said Alice G. Dugger has charged *has charged* herself, as administratrix of said John W. Dugger, in her account for partial settlement of said John W. Dugger's estate, with the amount of the share of the aforesaid balance, as stated as aforesaid, upon which account a decree of this court is this day rendered on partial settlement, and to which reference may be had.

It further appears that said Alice G. Dugger, as assignee of said H. B. Dugger, is entitled to retain the sum of five thousand and twenty-one $\frac{30}{100}$. It is therefore further decreed that she retain said sum as assignee accordingly.

It further appears by the account of said adm'r'x against said Waverly W. Dugger, individually, now here before the court, and by

34 him admitted to be correct, that after deducting from his distributive share of said estate, as hereinbefore declared, the several amounts heretofore advanced by her to, for, and on account of said W. W. Dugger there remains a balance in his favor of nineteen hundred and six $\frac{77}{100}$ dollars. It is therefore further ordered and decreed by the court that said Waverly W. Dugger recover of and from said

after the service thereof.

Witness V. Gayle Snedecor, register of said court of chancery, at of-

It further appears that letters of guardianship were granted to said Alice G. Dugger upon the estate of the aforesaid Reuben H. Dugger, and that her accounts and vouchers for a final settlement are now before the court for hearing and decree, and that in her said account as guardian she has accounted for and charged herself with the aforesaid sum of $5,021.30, the distributive share due to said Reuben H., as hereinbefore stated, which will more fully appear, reference being had to the account and decree of this court in the final settlement of said guardianship.

It further appears that letters of guardianship were also heretofore granted to said Alice G. upon the estate of the aforesaid Frederick E. Dugger, and that her account and vouchers for a final settlement of her guardianship of said Frederick E. are now before the court for hearing and decree, and that in her said account as guardian she has accounted for and charged herself with aforesaid sum of $5,021.30 dollars, the distributive share due to said Fred'k E., as hereinbefore stated, which will more fully appear, reference being had to the account and decree of this court in the final settlement of said guardianship.

It further appears that said Alice G. Dugger was also appointed, and still is the guardian of the aforesaid minors, Alice V. Dugger and H. C. Dudder, Frederick E. Dugger, and that she has accounted for and charged herself, as guardian of said minors, in her account now before the court for partial settlement of her guardianship of said minors, with their respective distributive shares of the estate of said Henry Dugger as hereinbefore, to wit, the sum of 5,021 $\frac{30}{100}$ dollars each, all of which will more fully appear, reference being had to the accounts against the said minors aforesaid and the decree of the court thereon.

JAMES H. YOUNG,
Judge, &c.

Filed in office this 31st day of October, 1873.

V. GAYLE SNEDECOR,
Register.

THE STATE OF ALABAMA,
Hale County:

Ninth district, western chancery division, to any sheriff of the State of Alabama, greeting:

We command you that you summon Willis P. Bocock, Henry A. Tayloe, Alice G. Dugger individually, Alice G. Dugger as adm'x of Henry Dugger, Alice G. Dugger as adm'r'x of John W. Dugger, Alice G. Dugger as guardian of Hobart C. Dugger and Alice V. Sprague, Wm. W. Dugger, Reuben H. Dugger, and Luke W. Dugger, of Hale County, to be and appear before our chancellor in our court of chancery at Greensboro' within thirty days after the service of this summons, and then and there to make answer to a bill of complaint lately exhibited by Hobart C. Dugger and Alice V. Sprague, who sues by her husband and next friend, Myrom T. Sprague, against said Willis P. Bocock, Henry A. Tayloe, Robert L. Maupin, Alice G. Dugger, in her individual capacity and as adm'r'x of the estates of Henry Dugger and John W. Dugger, and as guardian of H. C. Dugger and Alice V. Sprague, Wm. W. Dugger, Reuben H. Dugger, and Luke W. Dugger, and further to do and perform what our chancellor shall direct and order in that behalf; and this the said defendant shall in no wise omit, under penalty, &c. And we further command that you have this writ, with your

after the service thereof.

Witness V. Gayle Snedecor, register of said court of chancery, at office in Greensboro, this 31st day of October, in the year of our Lord one thousand eight hundred and seventy-three.

V. GAYLE SNEDECOR, *Register.*

Received in office 31st day of October, 1873, executed in full, except as to W. P. Bocock, not found in my county this 1st Nov., 1873.

F. M. HARRISS, *Sh'ff.*
By G. E. HARRISS, *D. S.*

Ret'd and filed in office this 3d day of November, 1873.

V. GAYLE SNEDECOR, *Register.*

Ninth district, western chance'y division.

THE STATE OF ALABAMA,
Hale County:

To any sheriff of the State of Alabama, greeting:

We command you that you summon Robert L. Maupin, of Marengo County, to be and appear before our chancellor in our court of chancery at Greensboro, within thirty days after the service of this summons, and then and there to make answer to a bill of complaint lately exhib-
38 ited by Hobart C. Dugger and Alice V. Sprague, who sues by her husband and next friend, Myrom T. Sprague, against said R. L. Maupin, W. P. Bocock, H. A. Tayloe, Alice G. Dugger, individually, and as adm'r of the estates of Henry Dugger and John W. Dugger and g'd'n of Hobart C. Dugger, and Alice V. Sprague, Wm. W. Dugger, Reuben H. Dugger, and Luke W. Dugger, and further to do and perform what our chancellor shall direct and order in that behalf; and this the said defendant shall in no wise omit, under penalty, &c. And we further command you that you have this writ, with your endorsement thereon, at our office in Greensboro, within five days after the service thereof.

Witness V. Gayle Snedecor, register of said court of chancery, at office in Greensboro, this 31st day of October, in the year of our Lord one thousand and eight hundred and seventy-three.

V. GAYLE SNEDECOR, *Register.*

Executed Nov. 11th, '73. Copy handed Maupin.

J. HARRISEN, *Sh'ff.*

Ret'd and filed in office this 29th day of November, 1873.

V. GAYLE SNEDECOR, *Register.*

39 HOBART C. DUGGER ET AL.
vs.
HENRY A. TAYLOE ET AL. } In Hale chance'y court.

The joint and several demurre's of Henry A. Tayloe and R. L. Maupin, parties defendant, to the bill of complaint of Hobart C. Dugger et al.

The defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's bill of complaint to be true as the same are therein alleged and set forth, demur thereto, and assign the following causes of demurrer:

1. That said bill of complaint is wanting in equity, in this that the same is an attempt in a collateral proceeding to impeach a final decree of the probate court of Marengo County, in the State of Alabama, a court having jurisdiction in the matter of the sale of the lands in said bill described.

2. That said bill is wanting in equity in this, that it shows that the lands in said bill mentioned were sold under a decree of the probate court of said Marengo County, a court having jurisdiction in the premises; that a petition for said sale was duly presented and filed in
40 said court, setting forth the grounds of said sale, as required by law, and the jurisdiction of said court for said purpose thereby attached, and said decree was conclusive and cannot be collaterally impeached.

3. That said bill is also wanting in equity in this, that it shows that the purchase-money for said land was paid by the purchaser and received and accepted by the administratrix in said bill mentioned, and that said purchase-money was on the final settlement of said administratrix, under a decree of the probate court of said Marengo County, distributed among the several distributees of said estate of Henry Dugger, dece'd and that the guardian of complainants received and charged herself, as such guardian, with the amounts of the shares respectively of said complainants, and complainants fail in said bill to offer to refund the same or the value thereof.

Wherefore, and for the causes aforesaid, the defendants pray the judgment of the court whether they shall be compelled to make any other or further answer to said bill for any of the matters therein contained, and pray to be hence dismissed with their reasonable costs in this behalf expended.

LYON & JONES,
Sol's for Def'ts.

41 Filed in office this 8th day of January, 1874.
V. GAYLE SNEDECOR, *Register.*

THE STATE OF ALABAMA,
Hale County:

Ninth district, western chancery division.

To any sheriff of the State of Alabama, greeting:

We command you, as we have once heretofore done, that you summon Willis P. Bocock, of Hale County, to be and appear before our chancellor in our court of chancery at Greensboro, within thirty days after the service of this summons, and then and there to make answer to a bill of complaint lately exhibited by Hobart C. Dugger and Alice V. Sprague, by her next friend, Myrom T. Sprague, against said Bocock, Henry A. Tayloe, R. L. Maupin, Alice G. Dugger, A. G. Dugger as adm'r of Henry Dugger, as adm'r of Jno. W. Dugger, and as guardian of Hobart C. Dugger and Alice V. Sprague, W. W. Dugger, R. H. Dugger, and L. W. Dugger, and further to do and perform what our chancellor shall direct and order in that behalf, and this the said defendant shall in no wise omit, under penalty, &c.

And we further command that you have this writ, with your en-
42 dorsement thereon, at our office in Greensboro, within five days after the service thereof.

Witness V. Gayle Snedecor, register of said court of chancery, at office

in Greensboro, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-four.

V. GAYLE SNEDECOR, *Register.*

Rec'd in office 15th day of Jan'y, 1874. Executed in full by handing a copy of the within to Willis P. Bocock this 21 March, 1874.

F. M. HARRIS, *Sh'ff.*
By GEO. E. HARRISS, *Dep'ty.*

Ret'd and filed in my office this 21st day of March, 1874.

V. GAYLE SNEDECOR, *Register.*

In chancery at Greensboro.

At the eighth regular term of the court of chancery, held for the ninth district, composed of the county of Hale, in the western chancery division of the State of Alabama, at the court-house of said county, in the town of Greensboro, on the fourth Monday after the fourt' Monday of May, being the twenty-second day of June, A. D. 1874, the honorable chancellor not being present, the sheriff adjourned the
43 court at 3 o'clock p. m. until to-morrow morning.

Tuesday, 23rd day of August, 8 a. m., Anthony W. Dillard, chancellor of the western chancery division presiding, the following proceedings were had.

DUGGER & SPRAGUE
vs.
BOCOCK ET. AL. } 48.

On motion it is ordered by the court that defendants Tayloe and Maupin have leave to assign in writing additional grounds of demurrer. Leave have' first obtained from the court, the defendants filed the additional grounds of demurrer, viz:

4. That said bill is wanting in equity in this, that it shows on the face, and in Exhibit D thereto attached, that Alice G. Dugger, the administratrix therein mentioned, made a final settlement of the estate of her intestate in 1864, and was discharged, in the probate court of Marengo County, at which settlement complainants were represented by guardians ad litem, and said bill fails to make any allegation of fraud, or to show any excuse why said final settlement was not appealed from.

5. Because the bill shows on its face that complainants had a full, adequate, and complete remedy at law.

44

J. T. JONES,
Sol. for Def'ts.

The foregoing additional grounds of demurrer, numbered 4 & 5, were filed in open court this 23d June, 1874, by leave of court.

V. GAYLE SNEDECOR, *Register.*

This cause then coming on to be heard upon the demurrers, and having been argued by the counsel and considered by the court, it is ordered by the court that the fourth ground of demurrer assigned to the bill be, and the same is hereby, sustained.

And it further appearing that said defect in the bill is amendable, the court grants complainant leave to amend the bill, and said complainants,

1. That said bill of complaint is wanting in equity, in this that the same is an attempt in a collateral proceeding to impeach a final decree of the probate court of Marengo County, in the State of Alabama, a court having jurisdiction in the matter of the sale of the lands in said bill described.

2. That said bill is wanting in equity in this, that it shows that the lands in said bill mentioned were sold under a decree of the probate court of said Marengo County, a court having jurisdiction in the premises; that a petition for said sale was duly presented and filed in
40 said court, setting forth the grounds of said sale, as required by law, and the jurisdiction of said court for said purpose thereby attached, and said decree was conclusive and cannot be collaterally impeached.

3. That said bill is also wanting in equity in this, that it shows that the purchase-money for said land was paid by the purchaser and received and accepted by the administratrix in said bill mentioned, and that said purchase-money was on the final settlement of said administratrix, under a decree of the probate court of said Marengo County, distributed among the several distributees of said estate of Henry Dugger, dece'd and that the guardian of complainants received and charged herself, as such guardian, with the amounts of the shares respectively of said complainants, and complainants fail in said bill to offer to refund the same or the value thereof.

Wherefore, and for the causes aforesaid, the defendants pray the judgment of the court whether they shall be compelled to make any other or further answer to said bill for any of the matters therein contained, and pray to be hence dismissed with their reasonable costs in this behalf expended.

LYON & JONES,
Sol's for Def'ts.

41 Filed in office this 8th day of January, 1874.
V. GAYLE SNEDECOR, *Register.*

THE STATE OF ALABAMA,
Hale County:

Ninth district, western chancery division.

To any sheriff of the State of Alabama, greeting:

We command you, as we have once heretofore done, that you summon Willis P. Bocock, of Hale County, to be and appear before our chancellor in our court of chancery at Greensboro, within thirty days after the service of this summons, and then and there to make answer to a bill of complaint lately exhibited by Hobart C. Dugger and Alice V. Sprague, by her next friend, Myrom T. Sprague, against said Bocock, Henry A. Tayloe, R. L. Maupin, Alice G. Dugger, A. G. Dugger as adm'r of Henry Dugger, as adm'r of Jno. W. Dugger, and as guardian of Hobart C. Dugger and Alice V. Sprague, W. W. Dugger, R. H. Dugger, and L. W. Dugger, and further to do and perform what our chancellor shall direct and order in that behalf, and this the said defendant shall in no wise omit, under penalty, &c.

And we further command that you have this writ, with your en-
42 dorsement thereon, at our office in Greensboro, within five days after the service thereof.

Witness V. Gayle Snedecor, register of said court of chancery, at office

in Greensboro, this 15th day of January, in the year of our Lord one thousand eight hundred and seventy-four.

V. GAYLE SNEDECOR, *Register.*

Rec'd in office 15th day of Jan'y, 1874. Executed in full by handing a copy of the within to Willis P. Bocock this 21 March, 1874.

F. M. HARRIS, *Sh'ff.*
By GEO. E. HARRISS, *Dep'ty.*

Ret'd and filed in my office this 21st day of March, 1874.

V. GAYLE SNEDECOR, *Register.*

In chancery at Greensboro.

At the eighth regular term of the court of chancery, held for the ninth district, composed of the county of Hale, in the western chancery division of the State of Alabama, at the court-house of said county, in the town of Greensboro, on the fourth Monday after the fourt' Monday of May, being the twenty-second day of June, A. D. 1874, the honorable chancellor not being present, the sheriff adjourned the
43 court at 3 o'clock p. m. until to-morrow morning.

Tuesday, 23rd day of August, 8 a. m., Anthony W. Dillard, chancellor of the western chancery division presiding, the following proceedings were had.

DUGGER & SPRAGUE
vs. } 48.
BOCOCK ET. AL.

On motion it is ordered by the court that defendants Tayloe and Maupin have leave to assign in writing additional grounds of demurrer. Leave have' first obtained from the court, the defendants filed the additional grounds of demurrer, viz:

4. That said bill is wanting in equity in this, that it shows on the face, and in Exhibit D thereto attached, that Alice G. Dugger, the administratrix therein mentioned, made a final settlement of the estate of her intestate in 1864, and was discharged, in the probate court of Marengo County, at which settlement complainants were represented by guardians ad litem, and said bill fails to make any allegation of fraud, or to show any excuse why said final settlement was not appealed from.

5. Because the bill shows on its face that complainants had a full, adequate, and complete remedy at law.

44 J. T. JONES,
Sol. for Def'ts.

The foregoing additional grounds of demurrer, numbered 4 & 5, were filed in open court this 23d June, 1874, by leave of court.

V. GAYLE SNEDECOR, *Register.*

This cause then coming on to be heard upon the demurrers, and having been argued by the counsel and considered by the court, it is ordered by the court that the fourth ground of demurrer assigned to the bill be, and the same is hereby, sustained.

And it further appearing that said defect in the bill is amendable, the court grants complainant leave to amend the bill, and said complainants,

having in open court declined so to amend the bill, it is ordered that the same be dismissed, and that the complainants pay the costs, for which execution may issue.

It is ordered that this court adjourn sine die.

June 24th, 1874.

A. W. DILLARD, *Chancellor.*

45 In chancery for 9th district, western chancery division, State of Alabama.

DUGGER & SPRAGUE
vs.
W. P. BOCOCK ET AL.

We, Hobart C. Dugger, W. W. Dugger, and Alice G. Dugger, acknowledge ourselves bound for the costs in the above-stated cause, including the costs of appeal to the supreme court of Alabama.

Witness our hands and seals this 1st day of July, 1874.

HOBART C. DUGGER, [SEAL.]
Per W. W. DUGGER, *Ag't.*
W. W. DUGGER. [SEAL.]
ALICE G. DUGGER. [SEAL.]

Taken, approved, and filed this 1st day of July, 1874.

V. GAYLE SNEDECOR,
Register.

In chancery, ninth district, western chancery division, State of Alabama.

HOBART C. DUGGER AND ALICE V. SPRAGUE, by her next friend & husband, Myron T. Sprague,
vs.
WILLIS P. BOCOCK, HENRY A. TAYLOE, ROBERT L. Maupin, Alice G. Dugger; Alice G. Dugger, adm'r'x Henry Dugger; Alice G. Dugger, adm'r'x John W. Dugger; Alice G. Dugger, g'd'n Hobart C. Dugger & Alice V. Sprague, W. W. Dugger, Reuben H. Dugger, & Luke White Dugger.

To Robert L. Maupin:

46 Whereas Hobart C. Dugger has taken an appeal from the decree rendered by the chancery court for said district in the above stated cause, on the 24th day of June, 1874:

You are therefore cited to appear at the January term, 1875, of the supreme court of Alabama, to defend on said appeal if you shall think proper so to do.

Witness my hand, this the first day of July, 1874.

V. GAYLE SNEDECOR,
Register.

Executed & copy left with Judge Maupin July the 13th, 1874.

JAS. HARRISIN, *Sh'ff,*
By D. D. YEARGER, *D. S.*

Ret'd and filed in office this 16th of July, 1874.

V. GAYLE SNEDECOR,
Register.

In chancery, ninth district, western chancery division, State of Alabama.

HOBART C. DUGGER AND ALICE V. SPRAGUE, by her next friend and husband, Myrom T. Sprague,

vs.

WILLIS P. BOCOCK, HENRY A. TAYLOE, ROBERT L. Maupin, Alice G. Dugger; Alice G. Dugger, adm'x Henry Dugger; Alice G. Dugger, adm'r' Jno. W. Dugger; Alice G. Dugger, g'd'n Hobart C. Dugger & Alice V. Sprague, Wm. W. Dugger, Reuben H. Dugger, & Luke White Dugger.

47 To Willis P. Bocock, Henry A. Tayloe, Alice G. Dugger, individually and as adm'r'x Henry Dugger, as adm'r'x Jno. W. Dugger, and as guardian of H. C. Dugger and Alice V. Sprague, Wm. W. Dugger, Reuben H. Dugger, and Luke W. Dugger:

Whereas Hobart C. Dugger has taken an appeal from the decree rendered by the chancery court for said district in the above-stated cause on the 24th day of June, 1874:

You are therefore cited to appear at the January term, 1875, of the supreme court of Alabama, to defend on said appeal, if you shall think proper so to do.

Witness my hand, this the first day of July, 1874.

V. GAYLE SNEDECOR,
Register.

Executed by handing a copy of the *copy of the* within to Willis P. Bocock and H. A. Tayloe this 6th July, 1874.

F. M. HARRIS, *Sh'ff*,
By GEO. E. HARRISS, *D'p'ty.*

We acknowledge due and legal service of the within citation this 1st July, 1874.

ALICE G. DUGGER.
ALICE G. DUGGER,
Adm'r'x of Henry Dugger.
ALICE G. DUGGER,
Adm'r'x of Jno. W. Dugger.
ALICE G. DUGGER,
Guar. of Hobart C. Dugger & Alice G. Dugger Sprague.
REUBEN H. DUGGER,
L. WHITE DUGGER,
By their ag't & att'y in fact, W. W. DUGGER.
W. W. DUGGER.

48 Ret'd and filed in office this 6th July, 1874.

V. GAYLE SNEDECOR,
Register.

HOBART C. DUGGER AND ALICE V. SPRAGUE, by her next friend & husband, Myrom T. Sprague,

vs.

WILLIS P. BOCOCK, HENRY A. TAYLOE, ROBERT L. Maupin, Alice G. Dugger, individually and as adm'r'x of the estates of Henry & Jno. W. Dugger, and as g'd'n of Hobart C. Dugger and Alice V. Sprague, William Waverly Dugger, Reuben H. Dugger, Luke White Dugger.

Ninth district, western chancery division, State of Alabama.

I, V. Gayle Snedecor, register of the chancery court for said district,

hereby certify that Hobart C. Dugger, complainant in the above-stated cause, having filed in my office a bond of appeal for costs of appeal, with W. W. Dugger and Alice G. Dugger as his sureties, did, on the 1st day of July, 1874, apply for and obtain an appeal from the decree rendered in said cause at the June term of said court, to wit, on the 24th day of June, 1874, to the supreme court of Alabama.

And I further certify that the foregoing pages, numbered from 3 to 29 inclusive, contain a full and complete transcript of all the rec-
49 ords, proceedings, and papers pertaining to said cause in the said court, as the same is and remains of record and on file in my office.

In witness whereof I have hereto set my hand and affixed the seal of my office, in said district, this 13th July, A. D. 1874.

{ CHANCERY COURT } V. GAYLE SNEDECOR,
{ OF HALE CO. SEAL. } *Register.*

Supreme court of Alabama. January term, 1875.

HOBART C. DUGGER AND ALICE C. SPRAGUE, by next friend, *vs.* WILLIS P. BOCOCK ET AL. } Appeal from chancery court of Hale County.

And said appellants come, by their solicitor, and say that in the records and proceedings in said cause there is manifest error, and for causes of error assign.

1. That the court erred in sustaining the demurrer to the bill.
2. In dismissing the complainant's bill.

ROB'T H. SMITH & ROULHAC,
Solicitor for Appellants.

Appellees come, by their solicitor, and say there is no error in the record.

J. T. JONES,
Sol. for Appellees.

50 *Filing in supreme court.*

Filed January 18th, 1875.

D. B. BOOTH, *Clerk.*

Submission.

July 21, 1876. Argued and submitted.

T. J. RUTLEDGE, *Clerk.*

And on the 2nd day of May, A. D. 1878, the following opinion and judgment were rendered, to wit:

Supreme court, Dec'r term, 1877, 6th division, No. 183. Appeal from Hale chancery court.

HOBART C. DUGGER ET ALS. *vs.* WILLIS P. BOCOCK ET ALS.

BRICKELL, C. J.:

The general rule in a court of equity is that neither creditors nor distributees or legatees can maintain a bill against debtors of an estate to

subject debts they may owe to the satisfaction of their demands. There is a want of parity between them and the'r debtors, and it would
51 introduce confusion in the administration of the assets and displace the powers of the personal representative. There are exceptions to the rule, as where there is collusion between the debtors and the personal representative, or he is insolvent and there is just apprehension of loss if he is permitted to collect them. or, as is said by Chancellor Kent, in Long vs. Majestre, 1 John Ch., 306, where there is some other special case not exactly defined. (1 Dan. Ch. Pr., 322-24; Story's Eq. Pl., §§ 178, 227, 514.)

The averments of the present bill are not of collusion between the personal representative and the debtor, but of fraud practiced on her and misrepresentation to her by the debtor, whereby she was induced to part with the evidences of the debt, and to accept payment in Confederate treasury notes and Confederate bonds, and of her insolvency and the insolvency of her sureties. Conceding the bill discloses a fraud and misrepresentation which will avoid the payment, the case may be regarded as an exception to the general rule, and the complainants permitted to recover of the debtor the debt the administratrix could recover.

The demand preferred is against Tayloe, and the relief prayed
52 is to subject to its satisfaction the lands he acquired from Bocock. The material question is whether there is a debt due from Tayloe to the administratrix, a debt which would have been assets in her hands for administration, and for the recovery of which she had a remedy, legal or equitable. The question must be answered negatively. Tayloe entered into no contract with the administratrix, nor had she at any time any evidence of debt on which he was liable as principal debtor. The contract into which he entered was with Bocock; whatever were its duties they were owing to Bocock alone, and whatever were its benefits were derived from him. The corresponding obligations of the contracts rested on Bocock and not on the administratrix, who in every respect was a stranger to it. If it be said it was Bocock's debts which was fraudulently paid to the administratrix, and that the complainants have an equity to subject to its payment pro tanto the lands Tayloe acquired from Bocock, the purchase money of which was the consideration of the debt, the answers is the release to Bocock, executed by the complainants, was an extinguishment of the debt. The reservation in the release is not
53 of a right to proceed against the lands purchased by Tayloe for any part of the debt contracted by Bocock. Such a reservation would be inconsistent with and repugnant to the intention of the parties as expressed in the release to acquit Bocock from all liability on account of the debt contracted in the purchase of the lands, and to quiet the title to the lands as divided between him and the complainants. Tayloe was a purchaser from Bocock, and the bill does not negative his payment of the purchase money. If the complainants could rightfully proceed to subject the lands he purchased to the satisfaction of the purchase money owing by Bocock, an equity would arise at once in his favor to subject first the lands with which Bocock had not parted, including the lands he had conveyed to the complainants. (M. M. D. & M. Ins. Co. vs. Huder, 35 Ala., 713.) It is manifest that the intention of the parties in the execution of the release would be thereby defeated.

The reservation in the release is not of a right to proceed against the lands purchased by Tayloe for any part of the debt of Bocock. It is of a right to assent against Tayloe the title of the complainant to
54 the lands he had purchased. How far this reservation can operate is not now a material question, and we express no opinion

in reference to it. If its operation as claimed by the complainant was admitted, their title to the lands is purely legal and the legal remedy is adequate. The decree of the court of probate declaring Bocock had paid the purchase money is simply void, not fraudulent, if the facts are as stated in the bill. Being void, the conveyances executed in pursuance of it is a mere nullity, and is not an impediment to a recovery on the legal title at law. Proceedings for a sale of lands by a personal representatives in the court of probate are in fieri until the court renders a decree declaring payment of the purchase money and directing a conveyance to the purchaser. The title of the heirs or devisees is not divested until conveyance is executed. (Doe ex den. vs. Hardy, 52 Ala., 291.) When the purchase money is fully paid, the conveyance of title may be decreed on the application of the personal representative or of the purchaser. (Code of 1876, § 2468.) The proceedings are in rem, and not in personam, against the heirs or devisees. The jurisdiction of the court having attached, notice to the heirs of the
55 application for a decree of conveyance of title is not essential to its validity. But if the application is by the purchaser, notice to the executor or administrator is essential, and a decree rendered without it is void. If the fact on which the decree rests and which it must recite is true, the personal representative loses all right to maintain an action at law, or suit in equity for the recovery of the purchase money, and he becomes chargeable with it in his representative capacity as assets. The statute is silent as to notice, but notice of any judicial proceedings which is to deprive a party of rights and impose on him liability is essential, and is implied from the very nature of the proceedings, though it may not be expressed in the statute which authorizes it. It would be most unreasonable to suppose the statute contemplates an ex parte proceeding by the purchaser whose interest it is to discharge himself from liability; and obtain title to the lands; (Brown vs. Wheeler, 3 Ala., 287; Curry vs. Hooper, 12 Ala., 823; Eslava vs. Lepetere, 21 Ala., 504; Shiver vs. Linn, 2 Hon. 43 Hollingsworth vs. Barbour, 4 Peters, 466; Lamar vs. Gunter, 39 Ala., 324.) The case of Dugger vs. Tayloe, 46 Ala., 320, announcing a different prin-
56 ciple, is overruled. The decree declaring the payment of the purchase money made without notice to the administratrix being void, and not an obstacle to a recovery by the complainants at law on their legal title, the result is in no one of its aspects has the bill equity, and the decree of the chancellor dismissing it must be affirmed.

Supreme court, Thursday, May 2, 1878.

Court met pursuant to adjournment.

Present and presiding as judges: Hon. Robert C. Brickell, chief justice; Hon. George W. Stone, associate justice.

HOBART C. DUGGER ET AL.
vs.
WILLIS P. BOCOCK ET AL.
} 6 div., 183.

Come the parties, by attorneys, and the record and matters therein assigned as error being argued and submitted on briefs of counsel, and duly examined and considered by the court, it is adjudged that in the record and proceedings of said court of chancery there is no error. It is thereupon considered that the decree of said chancery court be in
57 all things affirmed.

It is also considered that the appellants, and W. W. Dugger and Alice G. Dugger, sureties on appeal bond, pay the costs of said appeal in this court and in the chancery court.

And on, to wit, the 6th day of August, A. D. 1878, the following petition for writ of error *writ of error*, bond, and citation were filed in the office of the clerk of the supreme court of Alabama.

In the supreme court of Alabama.

HOBART C. DUGGER & ALICE V. SPRAGUE, by her huband, Myron T. Sprague, appellants,
vs.
WILLIS B. BOCOCK, HENRY A. TAYLOE, ROB'T L. Maupin, et. als., appellees.

To the honorable Robt. C. Brickell, chief justice of the supreme court of Ala.:

Your petitioners, Hobart C. Dugger and Alice V. Sprague, by her husband, Myron T. Sprague, of Mobile, Alabama, who are appellants in said stated cause, respectfully aske the allowance of a writ of error to the supreme court of Alabama, returnable to the Supreme Court of the United States, and to the first day of the next term thereof, to reverse
58 the judgment rendered in said cause by the said supreme court of Ala. on the nd day of May, A. D. 1878; and that said writ of error may operate an appeal from said cause as decided by said supreme court of Alabama. And petitioners herewith submit for your honor's inspection a full copy of the record in said cause.

THOS. R. ROULHAC,
Sol. for Appellants and Petitioners.

Allowed August 6th, 1878.

ROBT. C. BRICKELL,
Chief Justice Supreme Court of Alabama.

Filed in office clerk supreme court of Alabama, August 6, 1878.
T. J. RUTLEDGE, *Clerk.*

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Alabama, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of Alabama, before you, or some of you, being the highest court of law or equity of the
59 said State in which a decision could be had, in a suit between Hobart Cobbs Dugger and Alice Victoria Sprague, who sues by her husband, Myron T. Sprague, all of the city of Mobile, appellants, and Willis P. Bocock, Henry A. Tayloe, Robert L. Maupin, Alice G. Dugger, Alice G. Dugger, adm'r'x of Henry Dugger, Alice G. Dugger as adm'x of John W. Dugger, Alice G. Dugger as guardian of Hobart C. Dugger and Alice V. Sprague, Wm. Waverly Dugger, Reuben H. Dugger, and Luke W. Dugger (all of Hale County,

Ala.), appellees, where a title, right, privilege, or immunity was claimed under the Constitution or statutes of the United States, and the decision was against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution or statute; or where it was claimed the decision of the State court impaired the obligation of a contract, and violated the legal tender laws of the United States, or violated subdivision 1, sect. 2, Art. IV, of the U. S. Constitution, or violates sect. 2, Art. VI, of the U. S. Constitution, or favors the validity of sect. 579 of Ala. Code, 1876, which in this case operates a denial of justice to appellants, and takes their property without due process of law, or sanctions circulation of Confederate 8
60 per cent. bonds; or wherein was drawn in question the validity of a statute of, or an authority exercised under, the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to *to* Constitution or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or Statute of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution statute, a manifest error hath happened, to the great damage of the said Hobart C. Dugger and Alice V. Sprague, as by their petition and complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the
61 United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the first day of August, in the year of our Lord one thousand eight hundred and seventy-eight.

Issued first day of Aug., 1878.

CIRCUIT COURT OF THE UNITED STATES, MIDDLE DISTRICT OF ALABAMA, SEAL.

J. W. DIMMICK,
Clerk of the Circuit Court of the United States for Fifth Circuit & Middle District of Alabama.

Allowed by—

ROB'T C. BRICKELL,
Chief Justice Supreme Court of Alabama.

Filed in office clerk supreme court of Alabama, August 6th, 1878.
T. J. RUTLEDGE, *Clerk.*

62 *Bond.*

Know all men by these presents, that we, Hobart C. Dugger, Alice G. Dugger, W. W. Dugger, Reuben H. Dugger, are held and firmly bound to Willis P. Bocock and Henry A. Tayloe in the sum of five hundred dollars, well and truly be paid to the said Bocock and Tayloe, their

heirs, executors, and administrators, and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this sixth day of August, 1878.

Whereas lately, at a hearing of a cause by the supreme court of Alabama, at a term of said court held in Montgomery, Ala. (on appeal from the chancery court of Hale Co., Ala.), in a suit depending in said court between Hobart C. Dugger and Alice V. Sprague, by her husband Myron T. Sprague, as appellants, and Willis P. Bocock, Henry A. Tayloe et als., as appellees, the decree of the chancellor was affirmed, and a decree rendered against said appellants, and the said appellants
63 have appealed to the United States Supreme Court, having obtained a writ of error and filed a copy of the same and the application and allowance thereof in the clerk's office of the said court, to reverse the decree and judgment in the aforesaid suit, and a citation directed to the said Willis P. Bocock, Henry A. Tayloe, Rob't L. Maupin, L. White Dugger, and other appellees, citing and admonishing each of them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next.

Now, the condition of the above obligation is such that if the said Hobart C. Dugger and Alice V. Sprague, by her husband, Myron T. Sprague, shall prosecute their appeal and writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

August 6th, 1878.

H. C. DUGGER. [SEAL.]
A. G. DUGGER. [SEAL.]
W. W. DUGGER. [SEAL.]
R. H. DUGGER. [SEAL.]
M. T. SPRAGUE, [SEAL.]
By T. J. RUTLEDGE. [SEAL.]

Approved by—

ROB'T C. BRICKELL,
Chief Justice Supreme Court of Alabama.

64 Filed in office clerk supreme court of Alabama, August 6th, 1878.

T. J. RUTLEDGE, *Clerk.*

Citation.

The United States of America to Willis P. Bocock, Henry A. Tayloe, Robert L. Maupin, Alice G. Dugger; A. G. Dugger, adm'r'x of Henry Dugger; A. G. Dugger, adm'r'x of John W. Dugger; A. G. Dugger, guardian of H. C. Dugger and A. V. Sprague, W. W. Dugger, Reuben H. Dugger, and Luke W. Dugger, or J. T. Jones, esq'r, their attorney of record, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein Hobart C. Dugger and Alice V. Sprague, by her husband, Myron T. Sprague, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the

judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

65

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of August, in the year of our Lord one thousand eight hundred and seventy-eight.

ROBERT C. BRICKELL,
Chief Justice Supreme Court of Alabama.

We, the undersigned defendants to the within-stated cause, on appeal to the Supreme Court of the United States, hereby accept and acknowledge service of the within citation and notice of appeal, and waive any and all legal notice of the appeal or other mode of service.

ALICE G. DUGGER.
A. G. DUGGER,
As Adm'r'x of Henry Dugger.
A. G. DUGGER,
As Adm'r'x of John W. Dugger.
A. G. DUGGER,
As Guardian of H. C. Dugger and A. V. Sprague.
W. W. DUGGER.
R. H. DUGGER.

On this second day of September, in the year of our Lord one thousand eight hundred and seventy-eight, personally appeared Wm. Waverly Dugger before me, the subscriber, George G. Lyon, as commissioner of circuit court of the United States for the southern division of the State of Alabama, and makes oath that he delivered a true copy of the within citation to James T. Jones, the solicitor of record for defendants, Willis P. Bocock, Henry A. Tayloe, & Rob't L. Maupin, in the cause of Hobart C. Dugger et al. vs. Willis P. Bocock et al., and that said copy was delivered in person at Linden, Marengo Co., Ala., August 19th, 1878.

66

W. W. DUGGER.

Sworn to and subscribed, the 2nd day of September, A. D. 1878, before me.

GEO. G. LYON,
U. S. Com. S. Dis. Ala.

Filed in office clerk supreme court of Alabama, August 6th, 1878.
T. J. RUTLEDGE, *Clerk.*

67 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Alabama, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of Alabama, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Hobart Cobbs Dugger and Alice Victoria Sprague, who sues by her husband, Myron T. Sprague, all of the city of Mobile, appellants, and Willis P. Bocock, Henry A. Tayloe, Rob't L. Maupin, Alice G. Dugger, Alice G. Dugger, adm'x of Henry Dugger, Alice G. Dugger as adm'x of John W. Dugger, Alice G. Dugger as guardian of Hobart C. Dug-

ger & Alice V. Sprague, Wm. Waverly Dugger, Reuben H. Dugger, & Luke W. Dugger (all of Hale County, Ala.), appellees, where a title, right, privilege, or immunity is claimed under the Constitution or statute of the United States, and the decision was against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution or statute; or where it was claimed the decision of the State court impaired the obligation of a contract & violated the legal tender laws of the United States, or violates subdivision 1, sect 2, Art. IV, of the U. S. Constitution, or violates sect. 2, Art. VI, of the U. S. Const, or favors the validity of sect. 579 of Ala. Code, 1876, which in this case operates a denial of justice to appellants, & takes their property without due process of law, or sanctions circulation of Confederate 8 per cent, bonds; or wherein was drawn in question the validity of a statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution or laws of the United States, and the
68 decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or statute of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution statute, a manifest error hath happened, to the great damage of the said Hobart C. Dugger and Alice V. Sprague, as by their petition & complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgments be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the first day of August, in the year of our Lord one thousand eight hundred and seventy-eight.

Issued first day Aug., 1878.

[SEAL.]

J. W. DIMMICK,
Clerk of the Circuit Court of the United States for Fifth Circuit & Middle District of Alabama.

Allowed by—

ROB'T O. BRICKELL,
Chief Justice Supreme Court of Alabama.

(Indorsed:) 2. Writ of error. Filed in office clerk supreme court of Alabama, August 6th, 1878. T. J. Rutledge, clerk.

69 The United States of America to Willis P. Bocock, Henry A. Tayloe, Robert L. Maupin, Alice G. Dugger; A. G. Dugger, adm'x of Henry Dugger; A. G. Dugger, adm'x of John W. Dugger; A. G. Dugger, guardian of H. C. Dugger; and A. V. Sprague, W. W. Dugger, Reuben H. Dugger, and Luke W. Dugger, or J. T. Jones, esq'r, their attorney of record, greeting:

You are hereby cited and admonished to be and appear a ta Supreme

Court of the United States to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Alabama, wherein Hobart C. Dugger and Alice V. Sprague, by her husband, Myron T. Sprague, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of August, in the year of our Lord one thousand eight hundred and seventy-eight.

ROB'T C. BRICKELL,
Chief Justice Supreme Court of Alabama.

70 On this second day of September, in the year of our Lord one thousand eight hundred and seventy-eight, personally appeared Wm. Waverly Dugger before me, the subscriber, George G. Lyon, as commissioner of circuit court of the United States for the southern division of the State of Alabama, and makes oath that he delivered a true copy of the within citation to James T. Jones, the solicitor of record for defendants Willis P. Bocock, Henry A. Tayloe, & Rob't L. Maupin, in the cause of Hobart C. Dugger et al. vs. Willis P. Bocock et al., & that said copy was delivered in person at Linden, Marengo Co., Ala., August 19th, 1878.

W. W. DUGGER.

Sworn to and subscribed, the 2d day of September, A. D. 1878, before me.

GEO. G. LYON,
U. S. Com'r So. Dis. Ala.

(Indorsed :) 4. Citation. Original. Filed in office clerk supreme court of Alabama, August 6th, 1878. T. J. Rutledge, clerk.

PETERSBURG, VA., *Aug.* 31, 1878.

In the matter of Hobart C. Dugger et al. vs. Willis T. Bocock et al., on appeal from the supreme court of Ala. to the Supreme Court of the United States at Washington, 2nd Monday in Oct'r, 1878.

I authorize W. W. Dugger, for me & in my name, to sign acknowledgment of service of citation & waiver of notice of appeal endorsed on original citation.

L. WHITE DUGGER.

We, the undersigned defendants to the within-stated cause on appeal to the Supreme Court of the United States, hereby accept & acknowledge service of the within citation & notice of appeal, & waive any & all legal notice of this appeal or other mode of service.

ALICE G. DUGGER.
A. G. DUGGER,
As Adm'x of Henry Dugger.
A G. DUGGER,
As Adm'x of John W. Dugger.
A. G. DUGGER,
As Guardian of H. C. Dugger & A. V. Sprague.
W. W. DUGGER.
R. H. DUGGER.
L. W. DUGGER,
Per W. W. DUGGER.

71 STATE OF ALABAMA,
Office Clerk Supreme Court:

I, T. J. Rutledge, clerk of the supreme court of Alabama, do hereby certify that the foregoing pages, numbered from one to sixty-six, both inclusive, contain a full, true, correct, and complete transcript of the record of a certain cause lately pending in the supreme court of Alabama, by appeal from the chancery court of Hale County, in said State, wherein Hobart C. Dugger et al. were appellants and Willis P. Bocock et als. were defendants, as the same appear of record and on file in my office as such clerk.

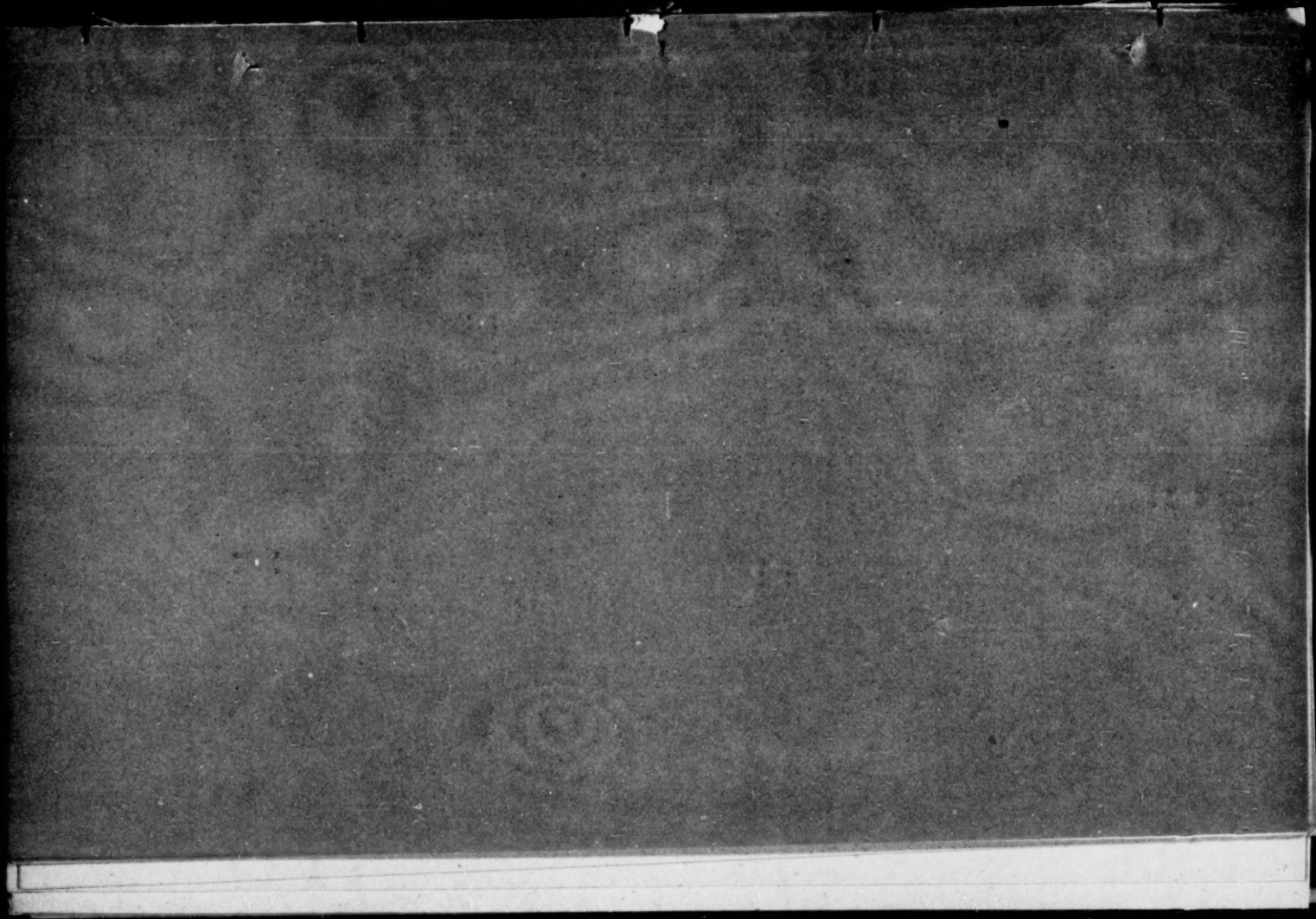
I further certify that the original writ of error and citation issued in said cause are hereto attached as a part of this transcript.

Witness my hand and the seal of said supreme court, at Montgomery, Alabama, on this 6th day of September, A. D. 1878.

[SEAL.] T. J. RUTLEDGE,
Clerk Supreme Court of Alabama.

(Indorsement on cover:) No. 165. Hobart C. Dugger and Alice V. Sprague, by her husband, Myron T. Sprague, plaintiffs in error, vs. Willis P. Bocock, Henry A. Tayloe, Robert L. Maupin, et al. Alabama supreme court. Filed 6th March, 1879.

No. 165—4



Supreme Court of the United States.

OCTOBER TERM, 187~~8~~—No. ~~1,099~~ 725

HOBART C. DUGGER AND ALICE V. SPRAGUE, BY HER HUSBAND, MYRON T. SPRAGUE, PLAINTIFFS IN ERROR,

vs.

WILLIS P. BOCOCK, HENRY A. TAYLOE, ROBERT L. MAUPIN, ET ALS.

WRIT OF ERROR TO THE SUPREME COURT OF ALABAMA.

NOTICE OF MOTION.

Please take notice that we will make a motion, in pursuance of rule 6 of this court, on Monday, the 12th day of May, 1879, to dismiss the writ of error herein for want of jurisdiction, there being no Federal question involved in the record.

J. T. JONES,
MIKE L. WOODS,
Attorneys for Defendants in Error.

To Hon. S. F. PHILLIPS,
Attorney for Plaintiffs in Error.

STATEMENT.

The bill shows that the plaintiffs in error are children of Henry Dugger, who died in the year 1852, leaving the defendant, Alice G. Dugger, his widow and administratrix, the plaintiffs in error, and certain other children, who are

made defendants, surviving him; that he died seized of certain lands set forth and described in the bill; that said Alice G. Dugger, as administratrix of said Henry Dugger, under an order of the Probate Court, sold said lands, amounting to 640 acres, on the 19th November, 1860, and that the defendant Willis P. Bocock became the purchaser thereof at the price of $45.01 per acre, amounting in the aggregate to the sum of $28,806.40, for which he executed his three notes, with sureties, payable respectively one, two, and three years after date; that said sale was duly reported by said Alice G. Dugger to the Probate Court, which was duly confirmed by said court.

The bill further shows that Willis P. Bocock was the ostensible purchaser of said lands, yet by some arrangement between him and the defendant Henry A. Tayloe, made before or at the time of purchase, said Tayloe obtained 196 acres of said lands, and undertook with said Bocock to pay the purchase-money for the same at the rate aforesaid, and said Tayloe went into and has since had the possession thereof; that the purchase-money for said 196 acres has never been paid, but that said Bocock took up the said two notes first falling due with Confederate States Treasury notes, and said note last falling due he took up by handing over to said administratrix bonds of the Confederate States, at a time when orator and oratrix were infants; that said administratrix received such Confederate notes for the note first falling due without remonstrance; that she reluctantly yielded and received the Confederate notes for the note secondly falling due, but when they urged her to accept said Confederate Treasury notes or bonds for the last note, she peremptorily refused to accept them, which were then really almost worthless, in payment of said note and for a long time she continued to refuse, but that she had great respect for said Bocock and Tayloe, who were her neighbors, and were men of high character, and, under great pressure brought to bear upon her by

them, she finally, under protest and unwillingly, reluctantly yielded and took said Confederate bonds, and gave up said note.

The bill further shows that said administratrix never did and never would report the payment of said purchase-money to said Probate Court, but purposely abstained from so doing, and that orator and oratrix, with the other heirs at law of said Henry Dugger, brought their action at law, in the nature of an action of ejectment, to recover said 640 acres of land; that they filed their written protest or caveat in said Probate Court on the 12th May, 1866, protesting against any confirmation of said sale and any order to make titles on the ground that said sale was without any valid or lawful order of said court, and that said sale was unauthorized and void, and that the entire purchase-money had never been lawfully paid, which protest is made part of the bill.

The bill further shows that said Bocock, on the 21st March, 1868, filed his petition in said Probate Court, alleging that the purchase-money had been paid, and that said administratrix had failed to report said payment, and praying that an order for a conveyance of said lands to him might be made; that said Probate Court, without notice to the administratrix, or to any of the heirs, and without their knowledge, appointed Henry A. Woolf to make said conveyance, and said Woolf, in compliance with said order, made a conveyance of said land to said Bocock; that the production of said conveyance in said action in the nature of ejectment caused the defeat of the same.

That said administratrix made a final settlement of said estate, charging herself with the sum or sums received of said Bocock in said Confederate notes and bonds.

The bill further shows, that on the 11th June, 1868, the said Bocock and the said administratrix, and orator and oratrix, who were then infants, and the other heirs at law of said Henry Dugger, entered into a compromise respect-

ing so much of said lands as was embraced by said sale, except the 169 acres sold to said Tayloe by said Bocock.

The bill charges that said Tayloe paid nothing for said lands except Confederate money and bonds, and that he participated with said Bocock in the wrong and injury to orator and oratrix, and seeks to subject the lands purchased by said Tayloe to the payment of the original purchase-money.

The defendants Tayloe and Maupin demurred to the bill and assigned several grounds of demurrer, one of which the Chancery Court sustained and dismissed the bill. The complainants appealed to the Supreme Court of the State, which court affirmed the decree of the Chancery Court.

The Supreme Court, in deciding the case, hold that there was no debt due from Tayloe to the administratrix which would have been assets in her hands; that Tayloe's contract was with Bocock; that the release to Bocock was an extinguishment of Bocock's debt; that Tayloe was a purchaser from Bocock, and the bill does not negative his payment of the purchase-meney; that if complainants could rightfully proceed to subject the lands purchased by Tayloe to the satisfaction of purchase-money owing by Bocock, an equity would at once arise in Tayloe's favor to subject first the lands with which Bocock had not parted; that the reservation in the release is not of a right to proceed against the lands purchased by Tayloe for any part of the debt of Bocock, but of a right to assert against Tayloe the title of complainants to the lands he had purchased.

The question, how far this reservation can operate, the court say, is not now a material question, and they express no opinion in reference to it; that if its operation as claimed by complainants was admitted, their title to the land is purely legal, and the legal remedy is adequate.

The court further hold, that the decree of the Probate Court, declaring that Bocock had paid the purchase-money, having been made without notice to the administratrix, is

void; and being void, the conveyance executed in pursuance of it is a mere nullity, and is not an impediment to a recovery on the legal title at law, and therefore complainants' bill is without equity.

Points.

It seems scarcely necessary to do more than recite the facts shown by the pleadings to make it manifest that there is no Federal question involved in the record.

In questions relating to the jurisdiction of this court, the true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right.

It must appear, by clear and necessary intendment, that the question must have been raised and must have been decided, in order to have induced the judgment.

The rule may be stated to be, that it must appear from the record of the State court that the Federal question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it, which judgment or decree must be adverse to the Federal right. (Murray *v.* Charleston, 96 U. S., 442.)

The two main questions decided by the Supreme Court of Alabama are—

First. That there is no debt due from Tayloe to the administratrix which would be assets in her hands for administration and for the recovery of which she has a remedy, legal or equitable; and that the reservation in the release to Bocock is not of a right to proceed against the lands purchased by Tayloe for any part of the purchase-money, but of a right to assert against Tayloe the title of the complainants to the lands he purchased. The court say, if the

ing so much of said lands as was embraced by said sale, except the 169 acres sold to said Tayloe by said Bocock.

The bill charges that said Tayloe paid nothing for said lands except Confederate money and bonds, and that he participated with said Bocock in the wrong and injury to orator and oratrix, and seeks to subject the lands purchased by said Tayloe to the payment of the original purchase-money.

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The question, how far this reservation can operate, the court say, is not now a material question, and they express no opinion in reference to it; that if its operation as claimed by complainants was admitted, their title to the land is purely legal, and the legal remedy is adequate.

The court further hold, that the decree of the Probate Court, declaring that Bocock had paid the purchase-money, having been made without notice to the administratrix, is

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operation of the release, as claimed by the complainants, was admitted, their title to the lands is purely legal, and the legal remedy is adequate.

Second. That the decree of the Probate Court, declaring that Bocock had paid the purchase-money, having been made without notice to the administratrix, is void under the laws of Alabama, and that the conveyance executed in pursuance thereof is a mere nullity, and is not an impediment to a recovery on the legal title at law.

The State court, therefore, rightfully affirmed the decree of the Chancery Court dismissing the bill for want of equity, without deciding the Federal question, even if it were admitted that the bill presented such a question.

The writ of error should be dismissed.

J. T. JONES,
MIKE L. WOODS,
For the Motion.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 725.

HOBART C. DUGGER AND OTHERS,

vs.

W. P. BOCOCK AND OTHERS.

(*Motion to Dismiss.*)

BRIEF FOR THE PLAINTIFFS IN ERROR.

The statement of facts made in the brief of the defendants in error is substantially correct. One additional matter that appears (near its close) in the Opinion of the court below, should be mentioned: *i. e.*, that the plaintiffs in error had previously brought an action *at law* to establish the right claimed in the present bill, and that the present defendants (those not such *only as matter of form*) succeeded in defeating that action by a suggestion that the remedy, if any, was *in equity*,—the judgment of the supreme court of Alabama being according to that suggestion.

The complainants, and some of the defendants, were children of a man who died in Alabama, in 1852, leaving a considerable estate, a part of the *realty* belonging to which was, by order of a probate court, sold in 1860, for division,

&c. The purchase money, (some $28,800,) was made payable in three annual instalments, the first becoming due in November, 1861.

The first two notes were paid to the administratrix in Confederate notes, and the amount of the last note, (about $11,900,) after the employment of *coercion*, was received by her, in 1864, in *Confederate bonds*.

One question in the record is, whether this last payment was not so apparently in furtherance of the rebellion as to be a nullity.

Hanauer *vs.* Woodruff, 15 Wall., 439.

It is said that the court below has not decided this question; and, that it dismissed the bill upon a simple point of equity pleading.

It will scarcely be denied that unless this latter point, or some other like point in the record, be valid, the supreme court of Alabama have given to the defendants the benefit of a negative of the question stated above; *i. e.*, have virtually so *decided* it. I understand the meaning of that word in Murdock *vs.* Memphis, 20 Wall., 590, to have that extent. *Not to decide, in such circumstances, is to decide!*

A question, therefore, arises whether the point of equity pleading taken below has been properly decided.

[This is the only one relied upon by the supreme court of Alabama. They suggest another question, but do not decide it. The point decided is that relied upon in the motion. If, upon inspection of the record, the court shall find any other matter of doubt, it is hoped that such question may be continued to the hearing, and opportunity be allowed for argument.]

A State court cannot evade its duty of giving effect to paramount Federal rights when duly challenged, by setting

up a point of local law, unless the latter be valid, (20 Wall., above.) If it were otherwise, rights under the United States Constitution might perpetually be discountenanced in State courts without such action becoming a subject of review here.

Now, it appears that these plaintiffs had sought to enforce this Federal right first in an Alabama *court of law;* and that, thereupon, in the highest court of that State, at the suggestion of the defendants, they were turned around, by a solemn decision that *whatever remedy they might have was in a court of equity;* and then, that upon adopting this so highly-sanctioned suggestion of their adversaries, and pressing the new remedy through all the courts of equity in the State, the same defendants are allowed, by the same supreme court, to defeat the action by the counter suggestion, that *whatever remedy the plaintiffs may have is in a court of law.*

In the meantime, this game of battledore gives to the defendants all the benefits of a decision favorable to themselves upon the Federal question involved.

If this device be effective, it is certainly deserving of admiration, for nothing can be more simple or more easy to be applied.

Let the situation be considered:

If these plaintiffs had brought error upon the former judgment, this Court would reasonably have said, as I submit, that the principle upon which the case was put in the State court, viz., that such and such dealings upon a sale of land in an Alabama court of probate, carry *the legal title* to such land, is a mere local principle incident to the judicial machinery and land law of the State, and so is to be adopted by the federal courts as their own law for such cases; therefore that there is no error. We did right, therefore, to submit, and to follow the suggestion of our adversaries, sanctioned by a judgment of the State supreme court.

Are we any the better off for such obedience? Or, is the method now in view a way of *suffocating* federal questions

in viam to the Supreme Court of the United States? If we bring another ejectment, may it not be again intimated that we had better once more resort to a court of equity?

For the Federal purposes now in question, it is submitted that the former of the two Alabama decisions gives the law upon the local point.

1. It makes no difference whether, as an original question, the plaintiffs ought to have gone into a court of law—after they had once done so, and at the instance of their adversaries had been turned around into a court of equity, the the latter were estopped (*in pais*) to take any defence inconsistent with the defence upon the same matter which they had previously urged with success. Under such circumstances the second decision should go, not upon the ordinary principles distinguishing courts of equity from courts of law, but upon the ground that, *ab inconvenienti*, the defendant cannot resort to such principles.

Kelly *vs.* Erchman, 3 Wharton, 419.
Abeel *vs.* Vangelder, 36 N. Y., 513.

It is submitted that, within the words of the court in the second of the above cases, we were to be treated as having been *invited* into a court of equity by the defendants.

2. It is also submitted that, whenever a Federal question is presented in a cause, by analogy to the long line of cases upon the subject of impairing the obligations of contracts, *the first decision of the supreme court of the State acted upon by the parties who raise such Federal question, is to be treated as giving the law of the State upon any local question therein involved.*

Upon the whole, it is submitted that the motion to dismiss will not be allowed.

S. F. Phillips,
For the Plaintiffs in Error.

SUPREME COURT U. S.
FILED
NOV 22 1881
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 165.

DUGGER AND OTHERS *vs.* BOCOCK AND OTHERS.

BRIEF FOR APPELLANTS.

S. F. PHILLIPS,
For the Appellants.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 165.

DUGGER AND OTHERS *vs.* BOCOCK AND OTHERS.

BRIEF FOR APPELLANTS.

The appellants are (record, p. 1) some of the heirs of Henry Dugger, who died intestate in Alabama, in 1852, leaving certain land; and the appellees are the purchasers of such land at probate-court sale, together with the administratrix of the deceased and the rest of his heirs.

The land was sold in 1860, for division, and Bocock became purchaser; (p. 2,) contemporaneously he resold a portion thereof to Tayloe. This was before he had paid for the land, or obtained a title; and Tayloe was privy to Bocock's methods of payment, and assisted in them. Bocock and Tayloe paid the purchase money, $28,806.40, to the administratrix in Confederate notes and bonds,—the last instalment, $11,906.64, after November 19, 1863, *in Confederate bonds* (p. 2,) under *official* threats of ruinous taxation by the Confederate Government if it was refused. (p. 3.)

After the close of the war the appellants and other heirs of the deceased brought ejectment for the land, and, pending the same, filed a protest in the court of probate against the execution of a deed therefor, (p. 3.) That court, however, upon application by Bocock, and without notice to the

heirs, disregarded the protest and made a conveyance; and in consequence thereof the above action, *at law*, was defeated.

Subsequently, (p. 4,) the heirs made a compromise with Bocock, and gave him an obligation by which they (in general) released all of their rights as against him, reserving what they might have as to the part (196 acres) owned by Tayloe.

The appellants have so acted as not to be embarrassed by the dealings of the administratrix, (pp. 1–6,) and Tayloe, besides being art and part in Bocock's payments, himself contributed, of the money received by the administratrix, Confederate bonds and notes to the amount of the price of the 196 acres now owned by him. (p. 6.)

The above is the substance of the bill filed below by the appellants, and this was demurred to by the appellees, (pp. 16, 17.)

The prayer was, to subject the land of Tayloe, &c., (p. 6.)

The release to Bocock, which is Exhibit C to the bill, is, briefly, (p. 8,) as follows, the parties being the heirs of the deceased and Bocock, and the date June 11, 1869:

"That in full compromise and settlement of the claims between the parties aforesaid [* *] in and to the lands hereinafter mentioned, [&c., the heirs convey a certain part of the land to Bocock, and Bocock conveys a certain other part to the heirs, and besides, Bocock] is hereby discharged from any and all claims which [the heirs] or any of them may have against him for any *use and occupation of*, or *trespass to*, any lands ever owned by [them, &c.;] but nothing herein contained shall in any manner impair or affect any right, title, or claim of any or either of the [heirs] to any lands in the possession of said Henry A. Tayloe," &c.

The supreme court of Alabama dismissed this bill, (p. 22.)

The Opinion is in the record, (p. 20, &c.,) and adjudges that (1) upon the above state of facts Tayloe was, *personally*,

under no obligation to the administratrix, but only to Bocock, and that to any suggestion that the appellants have an equity to subject Tayloe's land, the reply is, that Bocock's interests in the release requires that Tayloe also be released; otherwise, upon a recovery against the latter, he would have an equity for indemnity against Bocock, who, thereby, would substantially be defeated of his rights under the release. Also, admitting the release not to extend to the share of Tayloe, the appellants have no standing in a court of *equity*, their rights to the land being *legal*, inasmuch as the conveyance given by the court of probate was merely a *nullity*, and the decision heretofore in *Dugger* vs. *Tayloe*, erroneous, and now *overruled*.

This is an anomalous case:

1. The appellants had sued *at law* in the courts of Alabama, and thereupon been defeated and turned over to *equity*, on the ground that this probate conveyance was in law valid. Submitting to this, they sued in equity, and contrary to the plainest rues of estoppel the defendants were allowed to dispute the previous solemn decision made at their instance, and of which they had received the benefit, and have the appellants turned back again *to law*.

I submit that under the above circumstances there can be no reasonable question of their right to maintain this suit in equity.

2. The release also is, upon its face, clearly *and* expressly one in which Bocock has no discharge as against the claim which the heirs had upon Tayloe. He expressly agreed to that! There was no reason for excluding any conclusion of a release as well of Tayloe, *in a paper to which he was no party*,

were it not that otherwise, *indirectly*, he might have been released. The provisions of the release are plainly that Bocock agreed to stand by whatever risk might be occasioned *to himself* by any prosecution of a suit *against Tayloe.* And yet the court says that because of this very risk the significant clause regarding Tayloe means nothing.

3. The court below scarcely dispute the equity of the appellants against Tayloe's land, upon the case made by the record, supposing these, I mean, to have a standing in such a court at all; supposing, that is, that after the previous decision *at law* between the parties, the rights of the heirs because of such land must, in this suit, necessarily be regarded as equitable.

I submit therefore that in the absence of any plausible ground for the decision below—which has the direct effect of compelling minors to receive Confederate bonds in payment of a debt for land—this court will recognize that decision as being, upon its face, to the effect that such bonds, about November, 1863, were, *in invitos*, a valid discharge of an obligation.

Whilst nothing *is said* as to this point, in view of the circumstances, viz: that what is said as to other points seems to be in point of law, equally *nothing*, and also ~~inasmuch as~~ the whole record is eloquent of a protest by minors against the conversion of their lands into Confederate bonds,—I submit that a Federal question is apparent, viz., the recognition and allowance by the court below of an authority hostile to Federal authority, and protested against by the appellants for that reason.

This action I assign for error.

This record appears to state a case within the principles of Murdock *vs.* Memphis, 20 Wallace, 590. For, to apply

seriatim the rules under the 8th *head note* of that case, we have here—

1, 2, 3, 4. A question raised as to the legality of passing *in invitos* Confederate bonds as a circulating medium; An erroneous decision in the affirmative; No other matter to maintain the judgment; and thereupon,

5. It seems to follow that the judgment must be reversed.

S. F. PHILLIPS,
For the Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1881.

HOBART C. DUGGER and ALICE V. SPRAGUE, by her husband, MYRON T. SPRAGUE, Plaintiffs in Error,

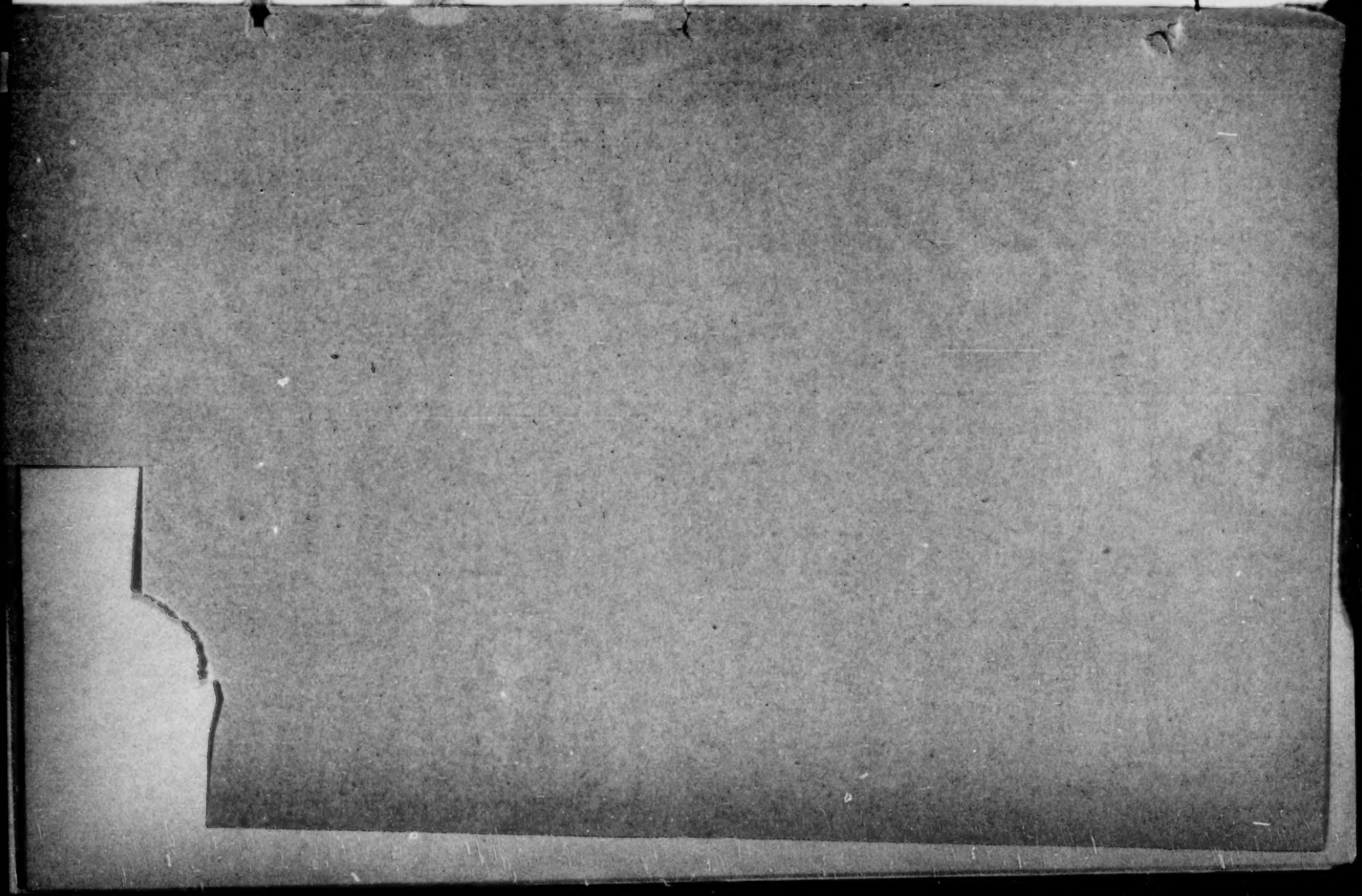
vs.

WILLIS P. BOCOCK, HENRY A. TAYLOE, ROBERT L. MAUPIN, et al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

MICHAEL L. WOODS,
For Defendants in Error.

Judd & Detweiler, Law Printers, Washington, D. C.



Supreme Court of the United States.

October Term, 1881.

HOBART C. DUGGER AND ALICE V. SPRAGUE, BY HER HUSBAND, MYRON T. SPRAGUE, PLAINTIFFS IN ERROR,

vs.

WILLIS P. BOCOCK, HENRY A. TAYLOE, ROBERT L. MAUPIN, ET AL.

In Error to the Supreme Court of the State of Alabama.

The brief for the defendants in error in the motion to dismiss this case for want of jurisdiction contains a full statement of the facts. The following statement is sufficient for the purposes of this brief:

Henry Dugger died in 1852, seized of certain lands mentioned in the bill. The complainants below, who are his children, bring their bill in the Chancery Court, in which they allege that Alice G. Dugger, who was the widow and administratrix of said Henry Dugger, filed her petition in the Probate Court of Marengo county as such administratrix on the 3d day of September, 1860, praying the order of said court to sell said lands, together with all the other

lands of said decedent, all amounting to six hundred and forty acres, for distribution, said estate being free from debt; that on the 22d day of October, 1860, said court ordered said lands to be sold, and on the 19th day of November, 1860, said lands were sold, and Willis P. Bocock, one of the defendants in error, became the purchaser thereof at the price of $42.01 per acre, the whole amounting to $28,806.40, on a credit of one, two, and three years, secured by his notes with sureties. The bill further alleges that although said Bocock was the ostensible purchaser of the whole of said land, yet, by some arrangement between him and Henry A. Tayloe, another of the defendants in error, made before or at the time of said purchase, said Tayloe obtained, by the understanding with said Bocock, one hundred and ninety-six acres of said land, and undertook with said Bocock to pay the purchase-money for the same at the rate aforesaid; that said Bocock took up the two notes first falling due with Confederate money, and the said note last falling due with Confederate bonds, which the said administratrix was induced to take by fraud and misrepresentation; that said sale was reported to the said Probate Court on the 12th day of January, 1861, and confirmed at the April Term thereof, but that said Alice G. Dugger, as said administratrix, never would and never did report to said Probate Court that the purchase-money for said lands had been paid, but purposely abstained from so doing.

The bill further shows that shortly after the war the complainants below, then infants, with other heirs at law of said Henry Dugger, brought their action at law, in the nature of an action of ejectment, to recover said lands, and, anticipating that said Bocock would make some efforts to obtain a conveyance to said land from said Probate Court, they filed their protest or caveat in said Probate Court on the 12th day of May, 1866, protesting against and objecting to any confirmation of said sale or order to make titles,

on the ground that the sale was without any valid or lawful order of said court, and that said sale was unauthorized and void, and that the entire purchase-money had never been lawfully paid; that after the filing of said protest or caveat, and while said action was pending in the Circuit Court, said Bocock, on the 21st day of March, 1868, filed his petition in said Probate Court, wherein he represented that he had paid the whole of said purchase-money; and that said Alice G. Dugger, as said administratrix, had not reported such payment, though more than a reasonable time had elapsed for her to have done so, and praying that an order for a conveyance of said lands to him might be made; and said Probate Court, without notice to said administratrix or to any of the heirs, and without knowledge by them of said application, and upon *ex parte* proof made by said Bocock, did appoint a person to execute titles to said Bocock, who made conveyance of said lands to said Bocock, without notice to or knowledge by said administratrix, and said action at law was defeated by the production of said conveyance.

The bill further shows that on the 11th day of June, 1868, an agreement was entered into between said Bocock and the heirs at law of said Henry Dugger, by which a full and final compromise and settlement of the claims between the parties touching and concerning their claims and rights in and to said lands, and of the suits between them in respect thereto, and of the damages, rents, and mesne profits, was effected. The said agreement contained the following provision:

"And the said party of the first part" [the said Bocock] "is hereby discharged from any and all claims which the parties of the second part, or any or either of them, may have against him for any use and occupation of or trespass to any lands ever owned by the parties of the second part, or either of them, whether the same were used and occupied by him or by any other person; but nothing herein contained shall in any manner impair or affect any right,

title, or claim of any or either of the parties of the second part to any lands in the possession of said Henry A. Tayloe, or to rents and damages for the use thereof by said Tayloe, or to any action pending against said Tayloe."

The prayer of the bill is that an account may be taken of the amount due complainants below, respectively, as their several portions of money arising from the sale of said one hundred and ninety-six acres of land; that payment of the same may be enforced against the said one hundred and ninety-six acres, and against the rents thereof, and that said lands may be sold therefor; and that the decree for titles to said Bocock, and the deed made thereto, may be held void, or if not, that it may be set aside, or held subordinate to complainants' lien.

The defendants below demurred to the bill, and the Chancery Court sustained the demurrer and dismissed the bill, which decree, on appeal, was affirmed by the Supreme Court of the State, whereupon this writ of error was taken.

The opinion of the Supreme Court of Alabama, delivered by Brickell, C. J., is as follows:

BRICKELL, C. J.—The general rule in a court of equity is that neither creditors nor distributees or legatees can maintain a bill against debtors of an estate to subject debts they may owe to the satisfaction of their demands. There is a want of privity between them and their debtors, and it would introduce confusion in the administration of the assets and displace the powers of the personal representative. There are exceptions to the rule, as where there is collusion between the debtors and the personal representative, or he is insolvent and there is just apprehension of loss if he is permitted to collect them, or, as is said by Chancellor Kent, in Long *v.* Majestre, 1 Johns. Ch., 306, where there is some other special case not exactly defined. (1 Dan. Ch. Pr., 322–24; Story's Eq. Pl., §§ 178, 227, 514.)

The averments of the present bill are not of collusion between the personal representative and the debtor, but of fraud practiced on her and misrepresentation to her by the

debtor, whereby she was induced to part with the evidences of the debt, and to accept payment in Confederate treasury notes and Confederate bonds, and of her insolvency and the insolvency of her sureties. Conceding the bill discloses a fraud and misrepresentation which will avoid the payment, the case may be regarded as an exception to the general rule, and the complainants permitted to recover of the debtor the debt the administratrix could recover.

The demand preferred is against Tayloe, and the relief prayed is to subject to its satisfaction the lands he acquired from Bocock. The material question is, whether there is a debt due from Tayloe to the administratrix, a debt which would have been assets in her hands for administration, and for the recovery of which she had a remedy, legal or equitable. The question must be answered negatively. Tayloe entered into no contract with the administratrix, nor had she at any time any evidence of debt on which he was liable as principal debtor. The contract into which he entered was with Bocock; whatever were its duties they were owing to Bocock alone, and whatever were its benefits were derived from him. The corresponding obligations of the contract rested on Bocock and not on the administratrix, who in every respect was a stranger to it.

If it be said it was Bocock's debt which was fraudulently paid to the administratrix, and that the complainants have an equity to subject to its payment pro tanto the lands Tayloe acquired from Bocock, the purchase-money of which was the consideration of the debt, the answer is the release to Bocock, executed by the complainants, was an extinguishment of the debt. The reservation in the release is not of a right to proceed against the lands purchased by Tayloe for any part of the debt contracted by Bocock. Such a reservation would be inconsistent with and repugnant to the intention of the parties, as expressed in the release, to acquit Bocock from all liability on account of the debt contracted in the purchase of the lands, and to quiet the title to the lands as divided between him and the complainants. Tayloe was a purchaser from Bocock, and the bill does not negative his payment of the purchase-money. If the complainants could rightfully proceed to subject the lands he purchased to the satisfaction of the purchase-money owing by Bocock, an equity would arise at once in his favor to subject first the lands with which Bocock had not parted,

including the lands he had conveyed to the complainants. (M. M. D. & M. Ins. Co. *v.* Huder, 35 Ala., 713.) It is manifest that the intention of the parties in the execution of the release would be thereby defeated.

The reservation in the release is not of a right to proceed against the lands purchased by Tayloe for any part of the debt of Bocock. It is of a right to assert against Tayloe the title of the complainants to the lands he had purchased. How far this reservation can operate is not now a material question, and we express no opinion in reference to it. If its operation as claimed by the complainants was admitted, their title to the lands is purely legal and the legal remedy is adequate. The decree of the Court of Probate declaring Bocock had paid the purchase money is simply void, not fraudulent, if the facts are as stated in the bill. Being void, the conveyance executed in pursuance of it is a mere nullity, and is not an impediment to a recovery on the legal title at law.

Proceedings for a sale of lands by a personal representative in the Court of Probate are in fieri until the court renders a decree declaring payment of the purchase money and directing a conveyance to the purchaser. The title of the heirs or devisees is not divested until conveyance is executed. (Doe ex den. *v.* Hardy, 52 Ala., 291.) When the purchase money is fully paid, the conveyance of the title may be decreed on the application of the personal representative or of the purchaser. (Code of 1876, sec. 2468.) The proceedings are in rem, and not in personam, against the heirs or devisees. The jurisdiction of the court having attached, notice to the heirs of the application for a decree of conveyance of title is not essential to its validity. But if the application is by the purchaser, notice to the executor or administrator is essential, and a decree rendered without it is void. If the fact on which the decree rests and which it must recite is true, the personal representative loses all right to maintain an action at law, or suit in equity for the recovery of the purchase money, and he becomes chargeable with it in his representative capacity as assets. The statute is silent as to notice, but notice of any judicial proceeding which is to deprive a party of rights and impose on him liability is essential, and is implied from the very nature of the proceeding, though it may not be expressed in the statute which authorizes it. It

would be unreasonable to suppose the statute contemplates an *ex parte* proceeding by the purchaser whose interest it is to discharge himself from liability and obtain title to the lands; (Brown *v.* Wheeler, 3 Ala., 287; Curry *v.* Hooper, 12 Ala., 823; Eslava *v.* Lepetere, 21 Ala., 504; Shiver *v.* Linn, 2 Hon., 43; Hollingsworth *v.* Barbour, 4 Peters, 466; Lamar *v.* Gunter, 39 Ala., 324.) The case of Dugger *v.* Tayloe, 46 Ala., 320, announcing a different principle, is overruled.

The decree declaring the payment of the purchase money made without notice to the administratrix being void, and not an obstacle to a recovery by the complainants at law on their legal title, the result is in no one of its aspects has the bill equity, and the decree of the chancellor dismissing it must be affirmed.

The learned counsel for the plaintiffs in error assigns as error "the recognition and allowance by the court below of an authority hostile to Federal authority, and protested against by the appellants for that reason."

This court, in Murray *v.* Charleston, 92 U. S., 441, say: "In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right."

The following propositions have been settled by this court in Murdock *v.* Memphis, 20 Wall., 590:

1. That it is essential to the jurisdiction of this court over the judgment of a State court, that it shall appear that one of the questions mentioned in the act of Congress must have been raised and presented to the court.

2. That it must have been decided by the State court, or that its decision was necessary to the judgment or decree rendered in the case.

3. That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws, or authority of the United States.

4. These things appearing, this court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State court.

5. If it finds that it was rightly decided, the judgment must be affirmed.

6. If it was erroneously decided against plaintiff in error, then this court must further inquire whether there is any other matter or issue adjudged by the State court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

It is not contended by the counsel for plaintiffs in error that the court below has directly decided the Federal question which he claims is involved in the record, but that "not to decide," under the circumstances of this case, "is to decide." The main question, if not the only one, decided by the court below, is that the decree of the Probate Court declaring the payment of the purchase-money having been made without notice to the administratrix, is void, and not an obstacle to a recovery by the plaintiffs in error, at law, on their legal title. If, therefore, the court should reach the conclusion that they have jurisdiction, the question will arise, under the sixth proposition, quoted above, is that matter or issue, so decided by the State court, sufficiently broad to maintain the judgment of that court? If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision.

It will be ascertained by reference to the history of this

litigation that the first obstacle in the way of recovery by the complainants below is the decree of the Probate Court directing titles to be made to Bocock, and the titles made in pursuance thereof. The action at law, originally brought, proceeded upon the theory that the decree was a nullity, but the Supreme Court of the State in that case held it valid, notwithstanding it was rendered without notice to the administratrix.

This suit was then begun in the Chancery Court to have that decree of the Probate Court declared void by a competent tribunal, and one of the prayers of the bill asks specifically for that relief. And the counsel for the plaintiffs in error in the Supreme Court of Alabama, in their brief printed in the report of the case, 60 Ala. Rep., 516, say: "The probate order, or decree under which a conveyance was executed to Bocock, does not conclude these complainants. Such an order is not grantable 'as of course.' It could only be properly granted in term time on proof of the fact of payment, and after due notice to the parties interested in contesting the payment. Not having been so granted, it is void, and the complainants are not concluded by it." The Supreme Court of Alabama took the same view, and declared the decree void. Notwithstanding which this writ of error was taken.

Upon the question of notice, in proceedings like the one under consideration, this court, in Hollingsworth *v.* Barbour, 4 Peters, 470, unanimously approved what Mr. Justice Trimble said at circuit, as follows: "By the general law of the land no court is authorized to render a judgment or decree against any one or his estate until after due notice by service of process to appear and defend. This principle is dictated by natural justice, and is only to be departed from in cases expressly warranted by law and excepted out of the general rule."

Mr. Greenleaf says: "It must appear that there have been regular proceedings to found the judgment or decree,

and that the parties in interest *in rem* have had notice, or an opportunity to appear and defend their interests, either personally or by their proper representatives, before it was pronounced; for the common justice of all nations requires that no condemnation should be pronounced before the party has an opportunity to be heard." (1 *Greenl. on Ev.*, sec. 541.)

But the Supreme Court of Alabama has decided the question, and the State courts are the appropriate tribunals for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress have acted upon a principle which implies a distrust of their integrity, or of their ability to construe those laws correctly. (20 Wall., 626.)

It was not necessary for the court below to decide the question whether the purchase-money had been paid by Bocock in a lawful manner or not. The effect of the decision, in response to the prayer of the bill that the decree of the Probate Court under which the conveyance was executed to Bocock was void, was to oust the Chancery Court of jurisdiction; for the reason that until a report of the payment of the purchase-money, an order of the Court of Probate directing conveyance, and a conveyance in pursuance of such order, the legal title to lands descended remains in the heirs, who may maintain ejectment for their recovery. (*Doe* v. *Hardy*, 52 Ala., 297.)

The writ of error should be dismissed, or if not, the judgment of the Supreme Court of Alabama should be affirmed.

MICHAEL L. WOODS,
For Def'ts in Error.

14-604

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

Nos. 11 and 12. ORIGINAL.

EX PARTE: IN THE MATTER OF PETER M. ROWLAND, D. C. SHUTZE, AND R. C. GERMANY, PETITIONERS.

No. 11. Original.

AND

EX PARTE: IN THE MATTER OF THE STATE OF ALABAMA, PETITIONER.

No. 12. Original.

RETURN TO RULE.

FILED 9th JANUARY, 1882.

SUPREME COURT OF THE UNITED STATES.

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FILED 9TH JANUARY, 1882.

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A Supreme Court of the United States. No. 11, Original.
October Term, 1881.

Ex parte: In the matter of PETER M. ROWLAND, D. C. SCHUTZE, and R. C. GERMANY, petitioners. } Petition for writs of *habeas corpus* and *certiorari.*

No. 12, Original. October Term, 1881.

Ex parte: In the matter of THE STATE OF ALABAMA, petitioner. } Petition for writs of *habeas corpus* and *certiorari.*

In obedience to the orders made in the above-entitled causes on the 19th day of December, 1881, (which said orders are hereto attached, and marked respectively Exhibits A and B,) that the marshal of the United States for the Middle and Southern Districts of Alabama show cause before said Supreme Court on the 9th day of January, 1882, why a writ of *habeas corpus* should not issue as prayed in each of said petitions, the said marshal now accordingly shows cause in this his return, and places the same on file in said Supreme Court, as applicable to each of said causes.

The respondent, M. C. Osborn, marshal as aforesaid, states that he has the said Rowland, Shutze, and Germany in his custody and in the jail of Montgomery county, Alabama, by virtue of, and in accordance with, an order of the Circuit Court of the United
A 1 States for the Middle District of Alabama, made in a cause of which it had jurisdiction, adjudging said prisoners to be guilty of contempt of said court, and committing them to said jail of Montgomery county until the fine and costs therein particularly designated and imposed by said court are duly paid as required by said order; all of which more fully and definitely appears by a duly certified transcript of said order and of the proceedings in said Circuit Court which preceded and resulted in the imprisonment of which said Rowland, Shutze, and Germany here and now complain. The respondent attaches hereto said certified transcript, marked Exhibit C, as a part and parcel of this his return to said orders to show cause. And respondent, in accordance with the statement of the Honorable John Bruce, the judge presiding in said Circuit Court at the May Term, 1881, and in accordance as well with the recollection of respondent, also states the following matters which occurred in said proceedings in said Circuit Court at said May Term, 1881, but do not appear of record, to wit: That on the trial, or hearing, of said Rowland, Shutze, and Germany, members of the court of county commissioners of Chambers county, in said Circuit Court at its said May Term, 1881, the Honorable John Bruce, as aforesaid, being then and there the presiding judge in said Circuit Court, it was proved to the satisfaction of the court that
A 2 soon after the peremptory writ of mandamus in the case of

said Dix & Co. *vs.* Chambers County had been awarded on the 9th day of December, 1875, one J. J. Robinson, at that time a member of the Alabama State Senate from said county of Chambers, introduced in the General Assembly of Alabama the bill which, as amended, passed and is now known as the act entitled "An act to allow tax collectors to give separate bonds for the collection of the ordinary State and county taxes, and all other taxes for special purposes," approved March 4th, 1876; that said Robinson urged the passage of that bill; that said bill was introduced by said Robinson with the knowledge and consent of said Rowland, Shutze & Germany, and the other two commissioners, who have since died; that said Rowland, Shutze & Germany had been elected to their respective offices, once before the issuance of said peremptory writ of *mandamus*, and once afterwards, upon a platform declaring opposition to the payment of the bonded indebtedness of said county of Chambers, including the coupons upon which said judgment in favor of Dix & Co. was obtained; that neither as a court of county commissioners, nor as individual members thereof, nor otherwise, did the prisoners, or either of them, ever make any effort to collect, or cause the collection of, the tax required to be collected under said peremp-
A 3 tory writ of *mandamas*, and commonly known and called "the mandamus tax," otherwise than by making the order of April 24th, 1876, which they set forth in their return to said *mandamus*, and in their return, also, to the rule requiring them to show cause why they should not be punished for contempt; that they had made addresses to the people of said county of Chambers in opposition to the payment of said bonded indebtedness, and to the collection and payment of said "mandamus tax," and that neither of them ever paid or offered to pay (either as officials or as tax-payers) any part of said *mandamus tax*.

Upon this proof, as well as upon the pleadings, judgments, orders, and other proceedings in the cause, particularly set out in the transcript hereto attached, the said Circuit Court, at its said May Term, 1881, adjudged said prisoners guilty of contempt for violating and disobeying said peremptory writ of *mandamus*, and was about to pronounce sentence upon them, when, thereupon, they, by and through their attorney, Wm. H. Smith, Esq., asked the court to withhold sentence and continue said attachment proceeding until the next (November) Term, 1881, of said Circuit Court, in order that they might have an opportunity by that time to pay said judgment, with interest and costs. Whereupon the court granted the indul-
A 4 gence asked for, withheld sentence, and continued the cause to the first day of the next term, to wit, until the 7th day of November, 1881, at 12 o'clock M., and the said Circuit Court, at its said May Term, made and caused to be duly entered upon the minutes of said Circuit Court the order of the 16th day of July, A. D. 1881, which appears on pages 59 and 60 of the certified transcript, hereto attached.

At the November Term, 1881, of said court, to wit, on the 7th day of November, said Rowland, Shutze and Germany appeared in open court in obedience to said order last hereinabove mentioned, and nothing having been paid on said judgment of Dix & Co., the counsel for said Dix & Co., at said November Term, and on said 7th day of November, at 12 o'clock M., read to the court the order hereinabove last mentioned, and in open court moved said Circuit Court, the Hon. John Bruce being then and there the judge presiding in said court, to pronounce sentence upon said Rowland, Shutze & Germany, in accordance with said order; whereupon said prisoners asked the court to grant them a further hearing; and upon the 21st day of November, A. D. 1881, after further and full hearing by the said Circuit Court of all matters connected with the original suit of Dix & Co. *vs.* Chambers County, the *mandamus* writs and contempt proceeding, and after further full and elaborate argument by other and different counsel in behalf of said Rowland, Shutze and Germany, the said Circuit Court, at its said November Term,
A 5 1881, the Hon. John Bruce then and there presiding in said Circuit Court, made and caused to be duly entered upon the minutes of said court the order of the 21st day of November, 1881, which appears on pages 61, 62, and 63 of said certified transcript, hereto attached.

And respondent states, and now makes return to said rule to show cause that said Rowland, Shutze and Germany were, under said order last hereinabove mentioned and referred to, duly delivered into the custody of respondent, as marshal as aforesaid, and were by him committed in accordance with said order to said jail of Montgomery county, Alabama, where said prisoners are now held and remain.

And respondent further states that the said judgment in favor of said Dix & Co., as well as the said fines and costs, are still unpaid and remain in full force.

M. C. OSBORN,
U. S. Marshal for the Middle and Southern Districts of Alabama.

B *Exhibit A.*

Supreme Court of the United States. No. 11, Original. October Term, 1881.

Ex parte: In the matter of PETER M. ROWLAND, D. C. SHULTZE, and R. C. GERMANY, petitioners. } Petition for writs of habeas corpus and certiorari.

On consideration of the petition of Peter M. Rowland, D. C. Shultze, and R. C. Germany, it is hereby ordered that cause be shown by the marshal of the United States for the Middle and Southern Districts of Alabama, before this court at Washington, in the Dis-

trict of Columbia, on the 9th day of January, 1882, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of habeas corpus should not issue as prayed in said petition.

19th December, 1881.

True copy. Test:

[SEAL.] JAMES H. McKENNEY,
Clerk Supreme Court U. S.

[Endorsed:] Received in office Dec'b'r 24, 1881; M. C. Osborn, U. S. marshal; executed by serving a copy on M. C. Osborn, U. S. marshal, and on Sam'l F. Rice, att'y, in Montgomery, Ala., Dec. 24, 1881; M. C. Osborn, U. S. marshal; by F. Jost, dep.; 2 copies; 4.

Exhibit B.

Supreme Court of the United States. No. 12, Original. October Term, 1881.

Ex parte: In the matter of THE STATE OF ALABAMA, petitioner. } Petition for writs of habeas corpus and certiorari.

On consideration of the petition of the State of Alabama, it is hereby ordered that cause be shown by the marshal of the United States for the Middle and Southern Districts of Alabama, before this court at Washington, in the District of Columbia, on the 9th day of January, 1882, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of habeas corpus should not issue as prayed in said petition.

19th December, 1881.

True copy. Test:

[SEAL.] JAMES H. McKENNEY,
Clerk Supreme Court U. S.

November Term, 1881.

At a Circuit Court of the United States for the fifth judicial circuit and middle district of Alabama, begun and holden at Montgomery, Alabama, on the first Monday in November, it being the seventh day of said month, in the year of our Lord one thousand eight hundred and eighty-one—present and presiding, the Honorable John Bruce, judge of the District Courts of the United States for the State of Alabama, sitting as circuit judge—

The following proceedings were had, to wit:

Summons.

DIX AND COMPANY vs. THE COUNTY OF CHAMBERS. } United States of America, Circuit Court of the United States for the middle district of Alabama.

The President of the United States of America to the Marshal of said district, greeting: You are hereby commanded to summon the county of Chambers, which is a municipal corporation created and organized and existing under and by virtue of the laws of Alabama, and which is a citizen of the State of Alabama, to appear before the honorable Circuit Court aforesaid at the place of holding
2 said court, at Montgomery, on the first Monday of November next, to answer the complaint of Charles Dix, George Crawford and Ferdinand Hincely, all of whom are aliens, and subjects or citizens of Spain and residing in Havana, Isle of Cuba, there doing business under the firm-name and style of Dix & Co., who are citizens or subjects of Spain and residing at Havana, Isle of Cuba, and have you then and there this writ.

Witness the Hon. MORRISON R. WAITE, chief justice of the Supreme Court of the United States, the first Monday of August in the year of our Lord one thousand eight hundred and seventy-four.

Issued the 10th day of October in the year of our Lord one thousand eight hundred and seventy-four.

Attest:

[SEAL.] J. W. DIMMICK,
Clerk U. S. Circuit Court Mid. Dist. of Alabama.

United States of America.

In the Circuit Court of the United States for the middle district of Alabama, November Term, 1874.

Complaint.

Charles Dix, who is an alien, and citizen or subject of Spain, residing at Havana, in the Island of Cuba, and George Craw-
3 ford, who is an alien, and citizen or subject of Spain, residing at Havana, in the Island of Cuba, and Ferdinand Hincely, who is also an alien, and citizen or subject of Spain, residing at Havana, in the Isle of Cuba, the three doing business together in the city of Havana and Island of Cuba under the firm-name and style of Dix & Co., complains of the county of Chambers, a municipal corporation duly organized and existing under and by virtue of the laws of the State of Alabama, which said corporation is a citizen of the State of Alabama and of the district aforesaid, and thereupon said plaintiffs claim of said defendant, which is a corporation duly incorporated and treated as such by the laws of the State of Alabama, the sum of twenty-five hundred dollars, being the amount

due upon and for forty-eight coupons which were attached to forty-eight of the bonds of said corporation, which said bonds are numbered from one hundred and two to one hundred and forty-nine, both inclusive, each of said bonds being in legal effect and substance as follows:

"UNITED STATES OF AMERICA.
4 STATE OF ALABAMA,
County of Chambers.

No. — $1,000.

Twenty-year eight per cent. bond issued in payment of stock of the Eufaula, Opelika, Oxford and Guntersville Railroad.

Know all men by these presents: That the county of Chambers, of the State of Alabama, acknowledges to owe the Eufaula, Opelika, Oxford and Guntersville Railroad Company, or the bearer hereof, one thousand dollars, on the first day of January, A. D. eighteen hundred and ninety, at the agency of the Eufaula, Opelika, Oxford and Guntersvill, Railroad Company in the city of New York, with interest thereon at the rate of eight per centum per annum, payable on the first days of July and January of each year, upon the presentation and surrender of the coupons hereto attached as they severally become due.

This bond being one of a series of one hundred and fifty bonds of one thousand dollars each, numbered from one to one hundred and fifty, inclusive, making an aggregate of one hundred and fifty thousand dollars, issued by said county of Chambers, under
5 authority and in pursuance of an act of the General Assembly of the State of Alabama entitled "An act to authorize the several counties, towns and cities of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their interests," approved December 31, 1868.

In witness whereof the judge of probate and county treasurer have signed this bond and caused the seal of the court of probate of said county of Chambers to be hereto affixed this first day of January, A. D. eighteen hundred and seventy.

[SEAL.] JOHN APPLEBY,
Judge of Probate.
JO. GRACE,
County Treasurer."

Attached to each of said bonds were forty coupons, numbered from one to forty, inclusive, the first coupon on each of said bonds being in substance and legal effect as follows:

"STATE OF ALABAMA, $40.00.
"*County of Chambers.*

"Forty dollars will be due and payable on the first day of July, 1870, at the agency of the Eufaula, Opelika, Oxford and Gunters-

ville Railroad Company in the city of New York, being six months' interest on bond No. — for $1,000 issued by county of Chambers in payment of subscription to Eufaula, Opelika, Oxford and Guntersville R. R. Co.

6 "JO. GRACE, *Treasurer.*

All the other coupons on said bonds were of the same substance and legal effect, with the exception of the dates of payment thereof, the first coupon on each of said bonds being payable as aforesaid on the first day of July, 1870, and one of said coupons successively falling due semi-annually thereafter until and up to and including the first day of January, 1890. There are now due and unpaid on said forty-eight (48) bonds of defendant forty-eight coupons, being one coupon due and unpaid on each of said forty-eight bonds, each of said coupons being for forty dollars, and were attached to bonds of said defendant, as above set forth and described, and numbered from one hundred and two to one hundred and forty-nine, both inclusive, each of said forty-eight

7 coupons being numbered to correspond with the number on each of said forty-eight bonds, and which forty-eight coupons, with interest thereon, are sued for in this action. The said forty-eight coupons attached to the said forty-eight bonds of the said defendant fell due on the first day of July, A. D. 1874, amounting in the aggregate to nineteen hundred and twenty dollars.

Plaintiffs aver that each and every one of said coupons, to wit, said forty-eight coupons, above described, together with interest thereon from the respective dates at which they severally fell due, are still due and unpaid.

And said plaintiffs further aver that they are the bona-fide owners and bearers of said forty-eight coupons above described, which, together with the said bonds to which they were attached, were executed and put in circulation, with the other coupons above mentioned, by the said defendant, and which said forty-eight coupons above described were purchased by the plaintiffs for value before any of them fell due. The plaintiffs aver that at the time the said

8 forty- eight coupons above described fell due the Eufaula, Opelika, Oxford, and Guntersville Railroad Co., then known as the East Alabama and Cincinnati Railroad Company, had no agency in the city of New York, and that defendant had no funds at any agency in said city of New York wherewith to pay said coupons; and that long before said coupons fell due, and at that time and ever since, defendant had repudiated all liability to pay said coupons, and refused to acknowledge any liability therefor.

This suit is brought to recover the amount due on said forty-eight coupons, (hereinabove described as having fallen due before this suit was commenced,) and interest thereon, according to their tenor and effect—all of which defendant hath hitherto, and does still, wholly

fail and refuse to pay, to the damage of plaintiffs three thousand dollars.

Wherefore this suit.

RICE, JONES AND WILEY,
Plaintiffs' Atty's.

I acknowledge myself security for costs at the instance of the plaintiffs in the above suit.

FERRIE HENSHAW.

9 (Endorsed:) Rec'd in office this 10th day of August, 1874; R. W. Healy, U. S. marshal; executed by serving copy of the within summons and complaint on the defendant, by handing to and leaving with Hon'l Jno. Appleby, judge of probate of the county of Chambers, a true copy of within summons and complaint, this the 12th day of October, 1874; R. W. Healy, U. S. marshal; by N. D. Read, deputy; returned executed and filed Oct. 20, 1874; J. W. Dimmick, clerk.

Plea.

Circuit Court of the United States for the Middle District of Alabama.

DIX & CO.
17 *vs.*
COUNTY OF CHAMBERS.

United States of America, ss:

And now comes the defendant by its attorneys, Stone and Clopton, and defends the wrong and injury, when, &c., and says it does not owe the said sum of money in the complaint demanded, or any part thereof, in manner and form as the plaintiffs have thereof
10 complained; and of this the defendant puts itself upon the country, &c.

And for further answer to the complaint the defendant says that the said Eufaula, Opelika, Oxford and Guntersville Railroad Company was not, at the time of said subscription to the capital stock of said company, a corporation; that no proposition was ever made by the president and a majority of the directors of said railroad company to this defendant to subscribe for and take an amount of its capital stock at a certain price per share, and pay for the same in the bonds of this defendant, as required by the first section of said act of the General Assemby of Alabama entitled "An act to authorize the several counties, towns, and cities of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests," approved December 31st, 1868.

And the defendant further says that the plaintiffs are not the pur-

chasers of said coupons in the complaint mentioned, and did
11 not become the owners and holders of said coupons in due course of trade and for a valuable consideration, without notice; and of this, &c.

STONE & CLOPTON,
Att'ys for Def't.

(Endorsed:) Filed this 16th day of Nov., A. D. 1874; J. W. Dimmick, clerk.

Judgment.

Tuesday, May 25, 1875.

DIX & Co.
17 *vs.*
COUNTY OF CHAMBERS.

This day came the parties by attorney, and thereupon came a jury of good and lawful men, to wit, F. M. Kohn and eleven others, who being duly elected, tried, and sworn well and truly to try the issue joined between the parties, on their oaths do say that they find for the plaintiffs, and assess their damages at twenty hundred and forty & $\frac{50}{100}$ dollars. It is therefore considered by the court that said plaintiffs recover of said defendant the said sum of twenty hundred and forty & $\frac{50}{100}$ dollars, and the costs in this behalf sustained; for which let execution issue.

12 UNITED STATES OF AMERICA,
Circuit Court of the U. S. for the Mid. District of Alabama.

The President of the United States to the marshal of said district, greeting:

You are hereby commanded that of the goods and chattels, land and tenements of the county of Chambers, defendant, of said district, you cause to be made the sum of twenty hundred and forty $\frac{58}{100}$ dollars, with interest thereon from the 25 day of May, A. D. 1875, which Dix & Company, plaintiffs, at a term of said court began and held on the first Monday of May, A. D. 1875, have recovered against said defendant, for their damages; also the sum of forty-one and $\frac{58}{100}$ dollars, which to the said plaintiffs in the same court are adjudged for costs and charges in that behalf expended; whereof the said defendant was convicted, as appears of record; and that you have the said sum of money before the said Circuit Court on the first Monday of November next, at the place of holding said court at Montgomery, to render to the said plaintiffs for their damages and costs aforesaid; and have you then and there this writ.

Witness Hon. MORRISON R. WAITE, chief justice of the Supreme Court of the United States, the 5th day of August, in the year of our Lord one thousand eight hundred and
[SEAL.] seventy five.

Issued the 5th day of August, in the year of our Lord one thousand eight hundred and seventy-five.

J. W. DIMMICK,
Clerk U. S. Circuit Court Mid. Dist. of Ala.

(Endorsed:) Fi. Fa. No. 17; Dix & Company *v.* The County
13 of Chambers; Circuit Court of the United States, Middle District of Alabama; judgment, $2,040.58; cost, $51.85; Rice, Jones & Wiley, plaintiff's attorney. Clerk's fee, $19.85; marshal's fee, $12.00; attorney tax fee, $20.00—$51.85. Received in office August 6th, 1875; R. W. Healy, U. S. marshal; no property found in my district; R. W. Healy, U. S. marshal.

14 *Petition for Mandamus.*

In the Circuit Court of the United States for the Middle District of Alabama.

EX PARTE
DIX AND COMPANY. } November Term, 1875.

To the Circuit Court of the United States for the Middle District of Alabama, and to the judge or judges thereof presiding therein:

The petition of Dix & Company, a firm composed of Charles Dix, who is an alien, and citizen or subject of Spain, residing at Havana, in the Island of Cuba, and George Crawford, who is also an alien, & citizen or subject of Spain, residing at Havana, in the Island of Cuba, and Ferdinand Hincely, who is also an alien, & citizen or subject of Spain and resident of Havana, in the Island of Cuba, & who together do business, under the firm-name and style of Dix & Company, respectfully shows unto your Honor, at the May Term, A. D. 1875, to wit: On the 25th day of May, A. D. 1875, said firm of Dix and Company recovered a judgment for the sum of two thousand and forty and $\frac{58}{100}$ dollars, besides the further sum of fifty-one dollars costs of suit, against the county of Chambers, in the State of Alabama, a municipal corporation duly created and organized under and
by virtue of the laws of said State, and recognized as such
15 corporation by the laws of said State.

That on, to wit, the 5th day of August, 1875, an execution, otherwise called a *fieri facias*, was regularly issued on said judgment by the clerk of said court, and under the seal of said court, and was placed by said clerk, on said day last above named, in the hands of Robert W. Healy, marshal of the United States for the middle district of Alabama, to be duly executed by him as such marshal according to the exigency and mandate thereof.

That the said execution, otherwise known and called a *fieri facias*, as aforesaid, has been duly returned by said marshal into the office of the clerk of said court on, to wit, the 6th day of August, A. D. 1875, with the indorsement thereon, "no property found."

That said judgment was obtained, as aforesaid, on certain coupons, which were originally attached to certain bonds, which were duly issued and put in circulation by said county of Chambers, under & by virtue of an act of the General Assembly of Alabama entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads
16 throughout the State as they may consider most conducive to their respective interests," approved December 31st, A. D. 1868, which said act is a public and general statute of the State of Alabama, and is still in force; and your petitioners aver that under the terms & provisions of said act the said county of Chambers was authorized & empowered to levy and assess, by and through its court of county commissioners, a tax upon the real and personal property in said county for the payment of said coupons as the same fell due, under the provisions of section 7 of said act above mentioned.

And your petitioners aver that notwithstanding the rendition of said judgment and the issuing of said *fieri facias*, or execution, as aforesaid, and notwithstanding the said court of county commissioners of said county was authorized and required to levy and assess said tax as aforesaid, the said court of county commissioners of said county have wholly neglected, failed, and refused, and still neglect, fail, and refuse to levy and assess said tax, or any part thereof. That the court of county commissioners of said County of Chambers is composed of the following named persons, all of whom reside in said County of Chambers, to wit: Hon. P. M. Rowland, judge of probate of said county and ex-officio the principal judge of said
17 court of said county commissioners, and R. C. Germany, J. H. Foreman, W. J. Grady, and D. C. Shutze.

And your petitioners further state and aver that said judgment is wholly unsatisfied and unreversed, and that they are wholly without remedy in the premises, unless it be afforded your petitioners by the interposition of this honorable court by a writ of mandamus against said court of county commissioners; and they therefore invoke the aid of this honorable court, and pray that a writ of mandamus, or such other appropriate and remedial writ as the facts hereinbefore stated will warrant, may issue against said court of county commissioners of said County of Chambers, composed of P. M. Rowland, judge of probate as aforesaid, and R. C. Germany, J. H. Forman, W. J. Grady, and D. C. Shulze, as aforesaid, and their successors in office, commanding them to levy and assess, in accordance with the provisions of said act of the General Assembly of said State of Alabama, such a tax upon the real and personal property in said County of Chambers as will be sufficient to satisfy the said judgment, with interest and costs, and that they continue to levy and assess said tax as aforesaid, from time to time, until said judgment is wholly satisfied, with interest and costs of suit; or that the said persons above named, constituting the court of county commissioners of said County of Chambers as aforesaid, be and appear before this honorable court

on the 30th day of November, 1875, at 10 o'clock A. M. of the same day, or as soon thereafter as said Circuit Court will hear the
18 same, and show cause, if any they have, why they refuse to levy and assess said tax as aforesaid.

And petitioners pray for such other or further orders, writs, and reliefs in the premises as may be authorized by the law of the land, and as to justice may seem meet and proper. And as in duty bound, your petitioners will ever pray, &c.

DIX AND COMPANY,

By their Attorneys,

RICE, JONES AND WILEY.

THE UNITED STATES CIRCUIT COURT }
19 For the Middle District of Alabama. }

Before me, J. W. Dimmick, clerk of said Circuit Court of the United States for the middle district of Alabama, this day personally appeared A. A. Wiley, who makes oath that he is a member of the law firm of Rice, Jones & Wiley, and one of the counsel for petitioners in the foregoing cause, and that the statements and allegations contained in the foregoing petition are true to the best of his knowledge, information, and belief.

A. A. WILEY.

Sworn to and subscribed before me, this the 15th day of November, 1875.

J. W. DIMMICK,
Clerk and U. S. Commissioner.

Filed this 15th day of November, A. D. 1875.

J. W. DIMMICK,
Clerk.

Order for Alternative Writ of Mandamus.

20 In the Circuit Court of the United States for the Middle District of Alabama.

DIX AND COMPANY *vs.* THE COURT OF COUNTY COMMISSIONERS of Chambers county, Alabama, composed of P. M. Rowland, judge of probate and ex-officio judge of said court of county commissioners, and J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Schutze.	November Term, 1875.

And now come the plaintiffs, Dix and Company, composed of Charles Dix, George Crawford, and Ferdinand Hincely, who are all

aliens, and citizens or subjects of Spain, residing at Havana, in the island of Cuba, and present and file their petition for a mandamus against the said court of county commissioners and their successors in office; and the court being fully advised in & of the premises, it is ordered that an alternative writ of mandamus issue to the said court of county commissioners of the county of Chambers, returnable to this court on the —— day of November inst., commanding said court of county commissioners and their successors in office to levy and assess, in accordance with the provisions of an act of the
21 General Assembly of the State of Alabama, entitled "An act to authorize the several counties and towns & cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests," approved December 31st, 1868, such a tax upon the real and personal property of said county, not to exceed one per cent. per annum, upon the real and personal property in said county as yearly assessed and returned to the proper officers of said county, as will be sufficient to satisfy said judgment in said petition mentioned, together with the interest thereon and the costs of suit; or that said court of county commissioners, or their successors in office, show cause before this court on the 30th day of November, 1875, at 10 o'clock A. M. of that day, or as soon thereafter as said Circuit Court will hear the same, why they have not done so.

W. B. WOODS,
Judge.

November 15, 1875.

Filed the 15th day of November, A. D. 1875, in open court.
J. W. DIMMICK, *Clerk.*

22 *Alternative Writ of Mandamus.*

In the Circuit Court of the United States for the Middle District of Alabama.

EX PARTE DIX & Co. } November Term, 1875.

To P. M. Rowland, judge of probate of Chambers county, Alabama, and ex-officio judge of the court of county commissioners of said county, and J. H. Forman, R. C. Germany, W. J. Grady, and D. C. Shutze, members of said court of county commissioners:

Whereas it has been made known to us by an application in writing, and under oath, filed in office on the 15th day of November, A. D. 1875, by Dix & Co., a firm composed of Charles Dix, George Crawford, and Ferdinand Hincely, who are aliens, and citizens or subjects of Spain, residing at Havana, in the Island of Cuba, & who

together do business under the firm-name and style of Dix and Company—

1. That at the May Term, A. D. 1875, to wit, on the 25th day of May, A. D. 1875, said petitioners, Dix and Company, recovered a judgment for the sum of two thousand and forty and $\frac{58}{100}$ dollars, besides the further sum of fifty-one dollars, costs of suit,
23 against the said county of Chambers, a municipal corporation tion duly created and organized under and by virtue of the laws of said State, and recognized as such corporation by the laws of said State;

2. That on, to wit, the 5th day of August, 1875, an execution, otherwise called a *fieri facias*, was regularly issued on said judgment by the clerk of said court, and was placed by said clerk, on said day last above named, in the hands of Robert W. Healy, marshal of the United States for the middle district of Alabama, to be duly executed by him as such marshal, according to the mandate thereof;

3. That the said execution, otherwise known and called a *fieri facias* as aforesaid, has been duly returned by said marshal into the office of the clerk of said court on, to wit, the 6th day of August, A. D. 1875, with the indorsement thereon, "no property found";

4. That said judgment was obtained as aforesaid on certain coupons, which were originally attached to certain bonds, which were duly issued and put in circulation by said county of Chambers under and by virtue of an act of the General Assembly of Alabama
24 entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests," approved December 31st, A. D. 1868, which said act is a public and general statute of the State of Alabama, and is still in force; and that under the terms and provisions of said act the said county of Chambers was authorized and empowered to levy and assess, by and through the court of county commissioners, a tax upon the real and personal property in said county for the payment of said coupons, as the same fell due, under the provisions of section 7 of said act above mentioned;

5. That notwithstanding the rendition of said judgment and the issuing of said *fieri facias* or execution as aforesaid, and notwithstanding the said court of county commissioners of said county was duly authorized and required to levy and assess said tax as aforesaid, the said court of county commissioners of said county have wholly neglected, failed, and refused, and still neglect, fail, and refuse to levy and assess said tax, or any part thereof;

6. That the court of county commissioners of said county
25 of Chambers is composed of the following named persons, all of whom reside in said county of Chambers to wit: The Hon. P. M. Rowland, judge of probate of said county, and ex-officio the principal judge of said court of said county commissioners, and R. C. Germany, J. M. Forman, W. J. Grady and D. C. Shutze;

7. That said judgment is wholly unsatisfied and unreversed, and that they are wholly without remedy in the premises unless it be afforded to said petitioners Dix & Co. by the interposition of this court by a writ of mandamus against said court of county commissioners; and they therefore invoke the aid of this court and pray that a writ of mandamus, or such other appropriate writ as the facts hereinbefore stated will warrant, may issue to the said court of county commissioners of said county, and to the individual members composing said court, as above named, and their successors in office, commanding them to levy and assess, in accordance with the provisions of said act of the general assembly of Alabama, such a tax upon the real and personal property in said county of Chambers as will
26 be sufficient to satisfy the said judgment with interest and costs, and that they continue to levy and assess said tax as aforesaid, from time to time, until said judgment is wholly satisfied with interests and costs of suit: Now,

8. Therefore, you, the said P. M. Rowland, judge as aforesaid, and R. C. Germany, J. H. Forman, W. J. Grady, and D. C. Shutze, members of and composing the court of county commissioners of said county, are hereby commanded to levy and assess, in accordance with the provisions of said act of the General Assembly of said State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy the said judgment, with interest and costs, and that they continue to levy and assess said tax as aforesaid, from time to time, until said judgment is wholly satisfied, with interest and costs of suit; or that you, the said persons above named, constituting the court of county commissioners of said county of Chambers as aforesaid, be and appear before this court on the 3d day of December, 1875, at 10 o'clock A. M. of the same day, or as soon thereafter as said Circuit Court
27 will hear the same, and show cause, if any you have, why you should not be required to levy said tax.

Witness the Hon. MORRISON R. WAITE, Chief Justice of the Supreme Court of the United States, this 19th day of November, in the year of our Lord one thousand eight hundred and seventy-five.

Issued the 19th day of November, A. D. 1875.

[SEAL.] J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Alabama.

[Endorsed:] Received in office November 22, '75; R. W. Healy, U. S. marshal; executed by serving a copy of the within on J. H. Forman and Robert C. Germany on the 30th November, 1875; also a copy of the within on A. J. Grady and D. C. Shutze on 1st day of December, 1875; and also a copy of the within on P. M. Rowland on December 2, 1875; R. W. Healy, U. S. marshal; by J. D. Williford, deputy.

28 *Order Setting Case for Hearing on 8th Dec.*, 1875.

Saturday, December 4, 1875.

DIX AND COMPANY
17 *vs.*
THE COUNTY OF CHAMBERS.

Upon motion of plaintiff's attorney, it is ordered by the court that this cause be set for hearing on Wednesday, the 8th inst.

Order for Peremptory Writ of Mandamus.

Tuesday, December 14th, 1875.

In the Circuit Court of the United States for the Middle District of Alabama.

DIX AND COMPANY
vs.
THE COURT OF COUNTY COMMISSIONERS of Chambers county, Alabama, composed of P. M. Rowland, judge of probate and ex-officio judge of the court of county commissioners, and J. N. Forman, R. S. Germany, W. F. Brady, and D. C. Schultz.

This cause came on to be heard at a former day of this term of the court, to wit, on the 9th day of December, 1875, and came the plaintiffs, Dix and Company, composed of Charles Dix, George Crawford, and Ferdinand Hincely, who are all aliens, and citizens or subjects of Spain, residing at Havana, in the Island of Cuba, and by & through their attorneys, Rice, Jones & Wiley, move the
29 court for a peremptory writ of mandamus against said court of county commissioners of Chambers county, and against each and every member of said court of county commissioners and their successors in office; and the court being fully advised of & in the premises from the papers on file in the office of the clerk of this court, which are here referred to and made a part of this judgment entry, it is now therefore considered and ordered by this court that a peremptory writ of mandamus issue forthwith and without delay to and against the said court of county commissioners, and every member of said court, and to their successors in office, commanding them to levy, assess, and cause to be collected, in accordance with the provisions of said act of the General Assembly of the State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy said judgment, with interest and cost, and that they continue to levy, assess, and cause the collection of said tax as aforesaid, from time to time, until said judgment is wholly satisfied, with interest and costs
30 of suit; and that said court of county commissioners shall make known to this court and the judge of this court, at the next term thereof, to wit, on the first day of May, A. D. 1876, how they have executed this writ.

Peremptory Writ of Mandamus.

In the Circuit Court of the United States for the Middle District of Alabama.

DIX AND COMPANY
vs.
THE COMMISSIONERS COURT of Chambers county, composed of P. M. Rowland, judge of probate and ex officio judge of the court of county commissioners of said county, and J. N. Forman, R. C. Germany, D. C. Shutze, and W. J. Grady, members of said court of county commissioners.

To P. M. Rowland, judge of probate of Chambers county, Alabama, and ex officio judge of the court of county commissioners of said county, and J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shultze, members of said court of county commissioners:

Whereas it has been made known to us by an application in writing and under oath, filed in office on the 15th day of
31 November, A. D. 1815, by Dix and Company, a firm composed of Charles Dix, George Crawford, and Ferdinand Hincely, who are aliens, and citizens or subjects of Spain, residing at Havana, in the Island of Cuba, and who together do business under the firm-name and style of Dix and Company—

1. That at the May Term, A. D. 1875, to wit, on the 25th day of May, A. D. 1875, said petitioners, Dix and Company, recovered a judgment for the sum of two thousand and forty and $\frac{58}{100}$ dollars, besides the further sum of fifty-one dollars cost of suit, against the said county of Chambers, a municipal corporation duly created and organized under and by virtue of the laws of said State, and recognized as such corporation by the laws of said State; and

2. That on, to wit, the 5th day of August, 1875, an execution, otherwise called a *fieri facias*, was regularly issued on said judgment by the clerk of said court, and under the seal of said court, and was duly placed by said clerk, on said day last above named, in the hands of Robert W. Healy, marshal of the United States for the
32 middle district of Alabama, to be duly executed by him as such marshal, according to the exigency and mandate thereof; and

3. That the said execution, otherwise known and called a *fieri facias* as aforesaid, has been duly returned by said marshal into the office of the clerk of said court on, to wit, the 6th day of August, A. D. 1875, with the indorsement thereon, "no property found"; and

4. That said judgment was obtained as aforesaid on certain coupons, which were originally attached to certain bonds, which were duly issued and put in circulation by said county of Chambers by &

through her proper officers, and under & by virtue of an act of the General Assembly of Alabama entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests," approved December 31st, A. D. 1868, which said act is a public and general statute of the State of Alabama, and is still in force; and that under the terms and provisions of said act the said
33 county of Chambers was authorized and empowered to levy and assess by and through the court of county commissioners a tax upon the real and personal property in said county for the payment of said coupons, as the same fell due, under the provisions of section 7 of said act above-mentioned; and

5. That notwithstanding the rendition of said judgment and the issuing of said *fieri facias*, or execution, as aforesaid, and notwithstanding the said court of county commissioners of said county was duly authorized and required to levy and assess said tax, they have wholly neglected, failed, and refused, and still neglect, fail, and refuse to levy and assess said tax or any part thereof; and

6. That the court of county commissioners of Chambers county is composed of the following named persons, all of whom reside in said county of Chambers, to wit: The Hon. P. M. Rowland, judge of probate of said county and ex-officio the principal judge of said court of said county commissioners, and R C. Germany, J. N. Forman, W. J. Grady, and D. C. Shutze; and

7. That said judgment is wholly unsatisfied and unreversed,
34 and that they are wholly without remedy in the premises unless it be afforded to petitioners, the said Dix and Company, by the interposition of this court by a writ of mandamus against said court of county commissioners of said county of Chambers, and the individual members thereof; and they therefore invoke the aid of this court to grant an alternative writ of mandamus, directed to said court of county commissioners, and to each & individual member composing said court, as above named, & their successors in office, commanding them to levy & assess, in accordance with the provisions of said act of the General Assembly of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy the said judgment, with interest & costs, & that they continue to levy and assess said tax as aforesaid, from time to time, until said judgment is wholly satisfied.

And *whereas* it further appears unto us that a *rule nisi* or said alternative writ of mandamus was duly issued on, to wit, the
35 19th day of November, A. D. 1875, made returnable to said court on the 30th of December 1875, directed to the court of county commissioners of said county of Chambers, and to the individuals composing said court of county commissioners, commanding them to be & appear before this court on said day last above

named, to show cause, if any they have, why a peremptory writ of mandamus should not be issued and awarded against them, commanding them to levy & assess said tax above named to meet & satisfy said judgment, with interest and cost. And said application for a peremptory writ of mandamus against said court of county commissioners having been duly heard and determined by the Honorable John Bruce, judge of the United States District Court for the middle district of Alabama, then holding & presiding over the United States Circuit Court for said middle district of Alabama: Now,

Therefore, you, the said P. M. Rowland, judge as aforesaid, and R. C. Germany, J. N. Forman, W. J. Grady, and D. C. Shutze, members of and composing the court of county commissioners of said county, are hereby commanded forthwith and without
36 delay to levy and assess and cause the collection of, in accordance with the provisions of said act of the General Assembly of said State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy said judgment, with interest and costs, and that you continue to levy and assess said tax & cause the same to be collected as aforesaid, from time to time, until said judgment is wholly satisfied, with interest and costs of suit; and how you shall have executed this writ make known to us, to the judge of this court, at the next term of said court, on the first day of said court, on, to wit, on the first day in May, A. D. 1876.

Witness the Honorable MORRISON R. WAITE, chief justice of the Supreme Court of the United States, this 17th day of December, A. D. 1875.

[SEAL.] J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Alabama.

(Endorsed:) Rec'd Dec. 17, '75, and executed by serving copies on the def'ts, P. M. Rowland, judge of probate and J. N.
37 Forman, R. C. Germany, W. J. Grady, and D. C. Shutze, composing the court of county commissioners of Chambers co., Ala., this 14th day of February, 1876; R. W. Healy, U. S. marshal; by J. D. Williford, deputy; filed this 10th day of March, A. D. 1876; J. W. Dimmick, clerk.

Return of Commissioner's Court of Chambers County to Peremptory Mandamus.

To the honorable the Circuit Court of the United States for the middle district of Alabama:

The commissioner's court of Chambers county, Alabama, in pursuance of a peremptory mandamus issued by said Circuit Court on the 17th day of December, 1875, has levied the tax as therein re-

quired, as will be seen from the annexed order, which has been placed upon the records of said court.

All of which is respectfully submitted.

P. M. ROWLAND,
Judge of Probate, &c.

38 At a regular adjourned term of the commissioner's court begun and held for Chambers county, Ala., on Monday, the 24th day of April, 1876—present, Hon. Peter M. Rowland, judge of Probate Court, D. C. Shutze, J. H. Forman, W. J. Grady, and R. C. Germany—when the following proceedings were had, to wit:

On the 17th day of December, 1875, a peremptory mandamus was issued out of the Circuit Court of the United States at Montgomery, Ala., and executed on the commissioners of said county on the 14th Feb'y, 1876, at the suit of Dix & Co., commanding the commissioner's court of Chambers county to levy a tax for the purpose of paying a judgment in said court in favor of said Dix & Co. against said county, rendered at the May Term, 1875, for the sum of two thousand and forty $\frac{58}{100}$ dollars, and fifty-one dollars costs, and that they report their action in the premises to the May Term, 1876, of said court.

Now, as required by said order, it is ordered that a tax of one-fourth of one per cent. on the value of the real and personal property of Chambers county be levied for the purposes above set forth,
39 and that the tax collector proceed to collect said tax as required by law.

(Endorsed:) Filed this the 3d day of May, A. D. 1876; J. W. Dimmick, clerk.

Continuances.

May Term, 1876.

17 DIX AND CO. *vs.* THE COUNTY OF CHAMBERS. } Continued.

November Term, 1876.

17 DIX AND CO. *vs.* THE COUNTY OF CHAMBERS. } Continued.

May Term, 1877.

17 DIX AND CO. *vs.* THE COUNTY OF CHAMBERS. } Continued.

November Term, 1877.

17 DIX AND CO. vs. THE COUNTY OF CHAMBERS. } Continued.

40 May Term, 1878.

17 DIX AND CO. vs. THE COUNTY OF CHAMBERS. } Continued.

41 *Order Quashing Return of Court of County Commissioners to Peremptory Writ of Mandamus.*

17 DIX AND COMPANY vs. THE COURT OF COUNTY COMMISSIONERS OF CHAMBERS COUNTY. } December 27, 1881.

This day came the plaintiffs by their attorneys, and, in pursuance of previous notice given by them to the attorneys of record of the respondents, moved this court to enter *nunc pro tunc* on the minutes of this court the judgment of this court of May 23, 1881, quashing the return of the respondents to the peremptory writ of mandamus issued to them in this cause on the 17th day of December, 1875, which return was filed in this court on the 3d day of May, 1876, and mentions said peremptory mandamus. And the said attorneys of respondents now being present in court, & having notice of this motion & an opportunity to oppose the same, thereupon it was duly proved to the court by the memorandum of the presiding judge, made and entered in this cause by him, in his own hand-writing and in open court, on the regular trial docket of this court on the 23d day of May, 1881, that said presiding judge did on that day in open court grant the motion of plaintiffs then pending to quash
42 said return of said respondents, and did quash said return; and did immediately thereafter, & on the day last aforesaid, order a rule to be issued to said respondents to show cause why they should not be punished for disobedience to said writ of peremptory mandamus. And it was further proved to this court that the said order for the issuance of said rule was duly entered on the minutes of this court on said 23d day of May, 1881, but that the said preceding action of the court in granting the said motion of plaintiffs to quash said return, and in quashing said return, has not been entered on the minutes of this court; this court now & here orders and causes to be entered on its minutes *nunc pro tunc* the following judgment in said cause, which should have been entered on said 23d day

of May, 1881, and which shall have the same effect as if it had been so entered on that day:

17	DIX AND COMPANY vs. THE COURT OF COUNTY COMMISSIONERS OF CHAMBERS COUNTY.	May 23d, 1881.

43 This day this court proceeded to hear the motion of plaintiffs to quash the return of the respondents to the peremptory mandamus in this cause heretofore issued to & served on them; and it appearing to the court that said return is insufficient, it is therefore considered by the court that said motion of plaintiffs to quash said return be granted, and that said return be, & the same is, hereby quashed.

And thereupon and immediately after said return had been quashed by the court, and on said 23d day of May, 1881, as appears from the entries of said Judge on said trial docket & the records of this court, the plaintiffs by their attorneys made the said motion for the issuance of said rule to the said court of county commissioners, as well as to said members thereof, which motion is mentioned in said entry on the minutes of this court of May 23d, 1881, and which motion was granted, as shown in said last-mentioned entry, which entry as to the motion and order therein shown is correct, and which entry, taken in connection with this judgment entry, shows the action of this court in this cause on said 23d day of May, 1881, and the order of time in which its said action was taken and had.

44 *Order for Rule to Show Cause, &c.*

May 23d, A. D. 1881.

17	DIX AND COMPANY *vs.* THE COURT OF COUNTY COMMISSIONERS of Chambers county, Alabama.	

This day come the plaintiffs by their attorneys and duly apply to & move the court for the issuance out of this court of a rule to the said court of county commissioners of Chambers county, as well as to the members thereof, that is to say, to P. M. Rowland, judge of probate, and ex officio judge of the said court of county commissioners, and to J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shutze, who were members of and together constituted said court of county commissioners of said county of Chambers at the time of the due and proper service upon them & each of them, on, to wit, the 14th day of February, 1876, of a peremptory writ of mandamus issued in said cause, as well as to each of the aforesaid members of said court of county commissioners, to appear instanter,

as soon as duly served, and then and there show cause, if any they have, why an attachment should not issue against them and each of them for violating & disobeying the said peremptory writ of
45 mandamus issued to and against them in said cause, and duly served on them as aforesaid, commanding them forthwith and without delay to levy and assess & cause the collection of, in accordance with the provisions of the act of the General Assembly of Alabama, therein particularly alluded to, such a tax upon the real and personal property in said county of Chambers as would be sufficient to satisfy a judgment obtained by plaintiffs in said cause on the 25th day of May, 1875, for $2,040.58, besides interest and costs, and that they should continue to levy and assess said tax, and cause the same to be collected as aforesaid, from time to time, until said judgment should be wholly satisfied, with interest and costs of suit.

And sufficient cause being shown to the court for the issuance of the rule moved for as aforesaid, it is therefore and thereupon ordered that the rule moved for be issued instanter, and be served and returned without delay.

46 *Rule to show cause.*

In the United States Circuit Court for the Middle District of Alabama.

To the court of county commissioners of Chambers county, Alabama, as well as to the several members thereof, that is to say, to P. M. Rowland, judge of the Probate Court of said county and ex officio a member of said court of county commissioners of said county, and to J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shutze, members of and who together constituted said court of county commissioners of Chambers county, on, to wit, the 14th day of February, 1876, as hereinafter mentioned, as well as to each of the above named persons, greeting:

Whereas at the present term of this court, to wit, on the 23d day of May, A. D. 1881, the following order was made and entered of record:

DIX AND COMPANY
vs.
THE COURT OF COUNTY COMMISSIONERS of Chambers county, Alabama.

This day came the plaintiffs by their attorneys and duly apply to and move the court for the issuance out of this court of a rule to the said court of county commissioners of Chambers county,
47 as well as to the members thereof, that is to say, to P. M. Rowland, judge of probate and ex-officio judge of the said

court of county commissioners, and to J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shutze, who were members of and together constituted said court of county commissioners of said county of Chambers at the time of the due and proper service upon them and each of them, on, to wit, the 14th day of February, 1876, of a peremptory writ of mandamus issued in said cause, as well as to each of the aforenamed members of said court of county commissioners, to appear instanter as soon as duly served, and then and there show cause, if any they have, why an attachment should not issue against them and each of them for violating and disobeying the said peremptory writ of mandamus issued to and against them in said cause, and duly served on them as aforesaid, commanding them forthwith and without delay to levy and assess and cause the collection of, in accordance with provisions of the act of the General Assembly of Alabama therein particularly alluded to, such a tax upon the
48 real and personal property in said county of Chambers as would be sufficient to satisfy a judgment obtained by plaintiffs in said cause on the 25th day of May, 1875, for $2,040.58, besides interest and costs, and that they should continue to levy and assess said tax and cause the same to be collected as aforesaid, from time to time, until said judgment should be wholly satisfied, with interest and costs of suit.

And sufficient cause being shown to the court for the issuance of the rule moved for as aforesaid, it is therefore and thereupon ordered that the rule moved for be issued instanter, and be served and returned without delay.

Now, therefore, you and each of you are hereby commanded to be and appear before this honorable court instanter, to show cause, if any you have, why an attachment should not be issued against you and each of you for violating and disobeying said peremptory writ of mandamus, as well as failing and neglecting to obey
49 the same. Of all of which you and each of you will take due notice and govern yourselves accordingly.

Witness the Hon. MORRISON R. WAITE, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, this 25th day of May, A. D. 1881.

[SEAL.] J. W. DIMMICK,
Clerk U. S. Cir. Court, Mid. Dist. of Alabama.

(Endorsed:) Executed by serving a copy of the within on P. M. Rowland, D. C. Shutze, and Robert C. Germany this 29th day of May, 1881. Forman and Grady are dead; M. C. Osborn, U. S. marshal; by W. B. Jackson, deputy.

50 *Return of P. M. Rowland et als. to Rule Nisi.*

In the Circuit Court of the United States for the Middle District of Alabama.

May Term, 1881.

EX PARTE
DIX & Co.

In this case a rule nisi having, on the 25th day of May, 1881, issued out of said court commanding P. M. Rowland, as probate judge of Chambers Co., Ala., and ex-officio a member of the court of county commissioners in and for said county, and J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shutze, members of said court of county commissioners, to appear instanter, or as soon as duly served with said rule nisi, and show cause why an attachment should not issue against them and each of them for violating and disregarding the peremptory writ of mandamus heretofore issued and served upon them at the suit of said Dix & Co., the said P. M. Rowland, judge of probate and ex-officio a member of said court as aforesaid, begs leave to make the following return, and to show cause under oath as follows why he should not be attached for contempt of the said Circuit Court of the United States:

He respectfully states that he was at the service of said peremptory writ of mandamus, has ever since been, and is now judge of the Court of Probate in and for said county of Chambers, and as such ex-officio a member of the court of county commissioners in and for said county, and that on the 24th day of April, 1876, the court of
51 county commissioners of said county of Chambers, at a regular term of said court, levied a tax of one-fourth of one per cent. on the assessed value of the real and personal property of the taxpayers of said county of Chambers to pay off and discharge the judgment mentioned in the peremptory writ of mandamus issued and served on him and the members of said court as aforesaid, which said levy is sufficient to pay off and discharge said judgment, together with all interest and costs of suit, the assessed value of the taxable property of said county for said year 1876 being one million six hundred and thirty-one thousand five hundred and sixty-six dollars, and the levy of one-fourth of one per cent. thereon is more than sufficient to pay off and discharge the judgment, to-
52 gether with all interest and costs. A copy of said levy is hereto attached, marked Exhibit A, and made part of this return.

Affiant, said P. M. Rowland, gave notice to J. G. Weaver, the then tax collector of said county, and requested him to collect the said one-fourth of one per cent. levied as aforesaid for the purpose aforesaid.

Said J. G. Weaver, tax collector as aforesaid, refused to collect said taxes, upon the ground that he had previously qualified under

the act of the Legislature of Alabama approved on the 4 day of March, 1876, by giving a bond for the collection of the State and county taxes for general and not special purposes, and his successor, J. M. Driver, who is the present tax collector of said county, executed his official bond in the same manner, and has upon the same ground refused to collect said special taxes so levied by said court as aforesaid; and that the said P. M. Rowland notified the governor of Alabama in the manner and within the time provided by law of the failure of each of said tax collectors to make a bond for the collection of special taxes. The said P. M. Rowland has done all
53 that the law authorized him to do in relation to the levy and collection of said taxes.

Under the laws of Alabama the said P. M. Rowland, as judge of probate of Chambers county and ex-officio a member of the court of county commissioners of said county, is simply the presiding officer of the said court of county commissioners, and has no authority to vote as a member of said court except in cases of a tie—a thing that has not occurred in any matter growing out of the assessment or collection of the said special taxes to pay said judgment as aforesaid.

If in anything affiant has been mistaken in his duties in the premises, he is willing to correct his mistakes and do whatever this honorable court may require. At no time has said P. M. Rowland been actuated by any intention to disobey the mandate of this honorable court, and if he has omitted any duty, it has been through mistake of his official duties, and not from any attempt to evade or oppose the authority of this honorable court.

54 All of which is respectfully submitted.

PETER M. ROWLAND.

Sworn to and subscribed before me this day of June, 1881.

J. W. DIMMICK,
U. S. Com'r for Mid. Dist. of Ala.

R. C. Germany and D. C. Shutze show cause as follows why they should not be attached for contempt of said Circuit Court for disobedience to the peremptory writ of mandamus mentioned in the above return of P. M. Rowland: Wm. J. Grady and James H. Forman were members of the court of county commissioners of said county of Chambers on the 24th day of April, 1876, and on that day, in obedience to the peremptory writ of mandamus mentioned in the above return of P. M. Rowland, the said Germany, Shutz, Forman, and Grady, who constituted said court of county commissioners, on said day, at a regular term of said court, levied one-fourth of one per cent. upon the assessed value of the real and personal property of the tax-payers of said county of Chambers to pay off and discharge the judgment mentioned and described in the peremptory
55 writ of mandamus served on them, together with all the interest due on said judgment and the costs of suit, and instructed

the then tax collector to collect the same. Said levy was sufficient to pay off said judgment, as shown by the return of said P. M. Rowland, and the then tax collector and his successor in office, the present tax collector of said county, have refused to collect the same for the reasons set forth in the return of Judge P. M. Rowland, above set forth.

Some time in the year 1878 J. H. Forman and some time in the year 1880 Wm. J. Grady died, and John Seroyer and John H. Higgins have been elected as their successors in office, and are now members of the court of county commissioners of said county.

Affiants further state that they are plain men, not learned in the law; that they never knew that there was any other duty devolving on them in relation to the collection of said tax than the levy of a sufficient tax to pay said judgment, with interest and costs of suit, until the service of the rule nisi in the present case.

56 Affiants honestly believed that when they had levied said tax and ordered the tax collector to collect the same they had done all they were required to do, and until the service of the rule nisi they did not know that they were required to do anything more, and whatever duty they may have omitted to perform was omitted through innocent or ignorant mistake of their duties; that they are willing and now offer to perform any and every duty required of them in relation to causing said taxes to be collected.

All of which is respectfully submitted.

D. C. SHUTZE,
R. C. GERMANY.

Sworn to and subscribed before me this 4th day of June, 1881.

J. W. DIMMICK,
U. S. Com'r for said Mid. Dist. of Alabama.

Exhibit A.

At a regular adjourned term of the commissioners' court, begun and held for Chambers county, Alabama, on Monday, the 24th day of April, 1876: Present—Hon. Peter M. Rowland, judge of probate court, D. C. Shutze, J. H. Forman, W. J. Grady, and R. C. Germany, commissioners; when the following proceedings were had,

57 to wit:

On the 17th day of December, 1875, a peremptory mandamus was issued out of the Circuit Court of the United States at Montgomery, Ala., and executed on the commissioners of said county on the 14th February, 1876, at the suit of Dix & Co., commanding the commissioners' court of Chambers county to levy a tax for the purpose of paying judgment in said court in favor of said Dix & Co. against said county, rendered at the May term, 1875, for the sum of two thousand and forty and $\frac{58}{100}$ dollars, and fifty-one dollars costs, and

the act of the Legislature of Alabama approved on the 4 day of March, 1876, by giving a bond for the collection of the State and county taxes for general and not special purposes, and his successor, J. M. Driver, who is the present tax collector of said county, executed his official bond in the same manner, and has upon the same ground refused to collect said special taxes so levied by said court as aforesaid; and that the said P. M. Rowland notified the governor of Alabama in the manner and within the time provided by law of the failure of each of said tax collectors to make a bond for the collection of special taxes. The said P. M. Rowland has done all
53 that the law authorized him to do in relation to the levy and collection of said taxes.

Under the laws of Alabama the said P. M. Rowland, as judge of probate of Chambers county and ex-officio a member of the court of county commissioners of said county, is simply the presiding officer of the said court of county commissioners, and has no authority to vote as a member of said court except in cases of a tie—a thing that has not occurred in any matter growing out of the assessment or collection of the said special taxes to pay said judgment as aforesaid.

If in anything affiant has been mistaken in his duties in the premises, he is willing to correct his mistakes and do whatever this honorable court may require. At no time has said P. M. Rowland been actuated by any intention to disobey the mandate of this honorable court, and if he has omitted any duty, it has been through mistake of his official duties, and not from any attempt to evade or oppose the authority of this honorable court.

54 All of which is respectfully submitted.

PETER M. ROWLAND.

Sworn to and subscribed before me this day of June, 1881.

J. W. DIMMICK,
U. S. Com'r for Mid. Dist. of Ala.

R. C. Germany and D. C. Shutze show cause as follows why they should not be attached for contempt of said Circuit Court for disobedience to the peremptory writ of mandamus mentioned in the above return of P. M. Rowland: Wm. J. Grady and James H. Forman were members of the court of county commissioners of said county of Chambers on the 24th day of April, 1876, and on that day, in obedience to the peremptory writ of mandamus mentioned in the above return of P. M. Rowland, the said Germany, Shutz, Forman, and Grady, who constituted said court of county commissioners, on said day, at a regular term of said court, levied one-fourth of one per cent. upon the assessed value of the real and personal property of the tax-payers of said county of Chambers to pay off and discharge the judgment mentioned and described in the peremptory
55 writ of mandamus served on them, together with all the interest due on said judgment and the costs of suit, and instructed

the then tax collector to collect the same. Said levy was sufficient to pay off said judgment, as shown by the return of said P. M. Rowland, and the then tax collector and his successor in office, the present tax collector of said county, have refused to collect the same for the reasons set forth in the return of Judge P. M. Rowland, above set forth.

Some time in the year 1878 J. H. Forman and some time in the year 1880 Wm. J. Grady died, and John Seroyer and John H. Higgins have been elected as their successors in office, and are now members of the court of county commissioners of said county.

Affiants further state that they are plain men, not learned in the law; that they never knew that there was any other duty devolving on them in relation to the collection of said tax than the levy of a sufficient tax to pay said judgment, with interest and costs of suit, until the service of the rule nisi in the present case.

Affiants honestly believed that when they had levied said
56 tax and ordered the tax collector to collect the same they had done all they were required to do, and until the service of the rule nisi they did not know that they were required to do anything more, and whatever duty they may have omitted to perform was omitted through innocent or ignorant mistake of their duties; that they are willing and now offer to perform any and every duty required of them in relation to causing said taxes to be collected.

All of which is respectfully submitted.

D. C. SHUTZE,
R. C. GERMANY.

Sworn to and subscribed before me this 4th day of June, 1881.

J. W. DIMMICK,
U. S. Com'r for said Mid. Dist. of Alabama.

Exhibit A.

At a regular adjourned term of the commissioners' court, begun and held for Chambers county, Alabama, on Monday, the 24th day of April, 1876: Present—Hon. Peter M. Rowland, judge of probate court, D. C. Shutze, J. H. Forman, W. J. Grady, and R. C. Germany, commissioners; when the following proceedings were had,
57 to wit:

On the 17th day of December, 1875, a peremptory mandamus was issued out of the Circuit Court of the United States at Montgomery, Ala., and executed on the commissioners of said county on the 14th February, 1876, at the suit of Dix & Co., commanding the commissioners' court of Chambers county to levy a tax for the purpose of paying judgment in said court in favor of said Dix & Co. against said county, rendered at the May term, 1875, for the sum of two thousand and forty and $\frac{58}{100}$ dollars, and fifty-one dollars costs, and

that they report their action in the premises to the May term, 1876, of said court:

Now, as required by said order, it is ordered that a tax of one-fourth of one per cent. on the value of the real and personal property of Chambers county be levied for the purposes above set forth, and that the tax collector proceed to collect said tax as required by law.

THE STATE OF ALABAMA,
Chambers County.

I, Peter M. Rowland, judge of the probate court and ex-officio principal judge of the commissioner's court of Chambers
58 county, Alabama, hereby certify that the foregoing pages, numbered 1 and 2, inclusive, contain a full, true, and complete transcript of an order of the commissioner's court of said county, entered on the 24th day of April, 1876, as the same appears of record.

Witness my hand this the 31st day of May, 1881.

PETER M. ROWLAND,
Judge of Probate & ex-officio Judge of the Commissioner's Court.

(Endorsed:) Filed July 16, 1881; J. W. Dimmick, clerk.

59 *Order adjudging Respondents Guilty of Contempt of Court, &c.*

Saturday, July 16, 1881.

DIX AND COMPANY
vs.
P. M. ROWLAND, judge of probate, &c., D. C. SHUTZE, and R. C. GERMANY, as members of the court of county commissioners of Chambers county, Alabama.

Rule to show cause why respondents should not be attached for contempt of court.

This cause came on to be heard upon the rule to show cause why the respondents above named should not be punished for contempt of court for failing to obey the peremptory writ of mandamus heretofore awarded against and duly served upon each of them. And thereupon respondents, appearing by Wm. H. Smith, Esq., their attorney, moved to quash the rule to show cause; which motion was overruled. The respondents then filed their respective answers to said rule, which were considered and held in all respects to be insufficient, and to furnish no excuse or exoneration for their failure to obey said writ. Said respondents, P. M. Rowland, D. C. Shutze, &
R. C. Germany, are therefore adjudged to be guilty of con-
60 tempt of this court in relation to said writ, but sentence is hereby suspended, and this cause continued until the next

term of the court, in order that said respondents may have an opportunity by that time to pay said judgment, with interest and costs; and said respondents are each required to be and appear before this court upon the first day of the next term of this court, to wit, upon Monday, the 7th day of November, A. D. 1881, at 12 o'clock M., to certify obedience to this order, and to receive such sentence as the court may deem meet to pronounce in the premises.

July 16, 1881.

JOHN BRUCE, *Judge.*

[Endorsed:] Filed July 16, 1881; J. W. Dimmick, clerk.

61 *Order Assessing Fine, &c.*

DIX AND COMPANY
vs.
P. M. ROWLAND, judge of probate of Chambers county, D. C. SHUTZE, and R. C. GERMANY, members of the court of county commissioners of said county of Chambers, in the State of Alabama.

November 21, 1881. Proceeding by attachment for contempt.

In this proceeding by attachment for contempt, all the parties this day appeared in this court, and were further heard by this court touching the matters of contempt involved in this proceeding. And it appearing to the court that at the last term of this court, to wit, on July 16, 1881, the respondents, the said Rowland, Shutze, and Germany, were fully heard as to the said matters of contempt in disobeying the said peremptory writ of mandamus duly issued out of this court theretofore to them and duly served on them, and that upon said hearing the said respondents were duly and properly adjudged and found by this court to be guilty of contempt of this court in relation to said peremptory writ of mandamus mentioned in this proceeding for contempt and in disobeying said last-mentioned writ, but that said respondents were required to appear in

62 this court on the first day of this term to receive such sentence as this court may deem meet to pronounce in the premises; and it is now made further to appear to this court that said respondents have not obeyed said peremptory writ of mandamus, nor certified any such obedience, but still continue to disobey said writ of peremptory mandamus, and that said respondents are guilty of said contempt in discharging said peremptory writ of mandamus, and that the judgment of said Dix and Company mentioned in that writ, and in respect to which that writ was issued, remains wholly unpaid and unsatisfied and of full force, and that the amount due upon said last-mentioned judgment, including the principal and lawful interest thereon and the costs up to this day, is thirty-one hundred and fifty-two dollars: it is therefore considered, ordered, and adjudged by this court that the said

respondents, the said P. M. Rowland, D. C. Shutze, and R. C. Germany, are guilty of said contempt in disobeying as well as in continuing to disobey the said peremptory writ of mandamus and the order and command of this court therein, and that for said contempt each of respondents is here and now sentenced by this court
63 to pay to the United States, as a fine for his said contempt, the sum of one thousand and eighty-eight dollars, and to be and to stand imprisoned in the common jail of Montgomery county, in the State of Alabama, until the said fine hereby imposed upon him and all the costs of this proceeding for contempt are paid; that in addition to said fines hereby imposed upon each of said respondents respectively, the sentence of this court also is that said respondents pay all the costs of this proceeding, and stand imprisoned as aforesaid until the whole of said costs shall be paid. But this court further orders and adjudges that if the said judgment of said Dix and Company, under and in respect to which said peremptory writ of mandamus issued, and also all the costs of this proceeding and of the proceeding in which said peremptory mandamus issued, shall hereafter be paid and satisfied in full, and such satisfaction be entered on the execution docket or minutes of this court before the said fines are paid, then and in that event all further proceedings under said sentence of this court shall thereupon cease, and the said respondents shall thence be discharged from imprisonment under said sentence.

JOHN BRUCE,
Judge.

64 UNITED STATES OF AMERICA,
Middle District of Alabama, } *ss:*

I, J. W. Dimmick, clerk of the Circuit Court of the United States for the fifth judicial circuit and middle district of Alabama, do hereby certify that the foregoing pages, numbered from one to sixty-three, inclusive, contain a full, true, and complete transcript of the record and proceedings in said Circuit Court in the aforementioned cause of Dix and Company against Chambers County, and in the mandamus proceedings, and in the contempt proceedings which arose out of and were had in said cause, as the same appear of record and on file in my office as such clerk.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed at Montgomery, in said district, this 31st day of December, A. D. 1881.

[SEAL.] J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Alabama.

Dec 16 Motion Miller

14—618

Petition and Transcript of Record.

SUPREME COURT OF THE UNITED STATES.

No.

EX-PARTE: PETER M. ROWLAND, D. C. SHULTZE, AND R. C. GERMANY.

PETITION FOR WRIT OF HABEAS CORPUS.

FILED DECEMBER 1881.

Mr Stoneman having had it three weeks to file
here. Rule to show cause

SUPREME COURT OF THE UNITED STATES.

No.

EX-PARTE: PETER M. ROWLAND, D. C. SHULTZE, AND R. C. GERMANY.

PETITION FOR WRIT OF HABEAS CORPUS.

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To the Hon. the Judges of the Supreme Court of the United States of America.

Your petitioners, Peter M. Rowland, D. C. Shultze, and R. C. Germany, show unto your honors, that they are illegally restrained of their liberty, in the jail of Montgomery County, in the State of Alabama, by the marshal of the Middle District of Alabama, under the order of the Circuit Court of the United States for the said Middle District of Alabama, as shown by the petition and proceedings thereto, addressed to the Hon. Don Pardee, the circuit judge of the United States for said district.

Your petitioners show that they applied for writ of habeas corpus to said Hon. Don Pardee, as shown in the petition and proceedings of the Circuit Court of the United States for the Middle District of Alabama, attached to said petition; and, that the said Hon. Don Pardee declined to issue said writ, and endorsed his refusal on the said petition.

Your petitioners hereto attach the petition, with the exhibits thereto attached, which they filed to said Hon. Don Pardee, and his endorsement thereon.

And your petitioners say that the facts set forth in said petition addressed to said Hon. Don Pardee are true, and it is true that the Hon. Don Pardee declined to issue said writ as prayed for. And your petitioners further say that the cause of their imprisonment is fully and truly set forth in the said petition to the Hon. Don Pardee, and none other exists.

Your petitioners pray for the writ of *habeas corpus* to be directed to M. C. Osborne, the said marshal of the said Middle District of Alabama, or for a writ of *certiorari*, or other remedial writ to the said United States Circuit Court for the said Middle District of Alabama, so that the cause of the imprisonment of your petitioners may be inquired into, and such order, judgment, or decree made in the premises as your honors may seem proper.

And as in duty, &c.

PETER M. ROWLAND.
D. C. SHULTZE.
R. C. GERMANY.

THE STATE OF ALABAMA, }
MONTGOMERY COUNTY. }

Personally appeared before me, John W. Watts, United States Commissioner for the Middle District of the United States Circuit Court for the State of Alabama, Peter M. Rowland, D. C. Shultze, and R. C. Germany, who having been duly sworn before me, and who are known to me, depose and say that the facts set forth in this the foregoing petition, and in the exhibits hereto attached, are true to the best of their knowledge, information, and belief.

PETER M. ROWLAND.
D. C. SHUTZE.
R. C. GERMANY.

To the Hon. the Judges of the Supreme Court of the United States of America.

Your petitioners, Peter M. Rowland, D. C. Shultze, and R. C. Germany, show unto your honors, that they are illegally restrained of their liberty, in the jail of Montgomery County, in the State of Alabama, by the marshal of the Middle District of Alabama, under the order of the Circuit Court of the United States for the said Middle District of Alabama, as shown by the petition and proceedings thereto, addressed to the Hon. Don Pardee, the circuit judge of the United States for said district.

Your petitioners show that they applied for writ of habeas corpus to said Hon. Don Pardee, as shown in the petition and proceedings of the Circuit Court of the United States for the Middle District of Alabama, attached to said petition; and, that the said Hon. Don Pardee declined to issue said writ, and endorsed his refusal on the said petition.

Your petitioners hereto attach the petition, with the exhibits thereto attached, which they filed to said Hon. Don Pardee, and his endorsement thereon.

And your petitioners say that the facts set forth in said petition addressed to said Hon. Don Pardee are true, and it is true that the Hon. Don Pardee declined to issue said writ as prayed for. And your petitioners further say that the cause of their imprisonment is fully and truly set forth in the said petition to the Hon. Don Pardee, and none other exists.

Your petitioners pray for the writ of *habeas corpus* to be directed to M. C. Osborne, the said marshal of the said Middle District of Alabama, or for a writ of *certiorari*, or other remedial writ to the said United States Circuit Court for the said Middle District of Alabama, so that the cause of the imprisonment of your petitioners may be inquired into, and such order, judgment, or decree made in the premises as your honors may seem proper.

And as in duty, &c.

PETER M. ROWLAND.
D. C. SHULTZE.
R. C. GERMANY.

THE STATE OF ALABAMA, }
MONTGOMERY COUNTY. }

Personally appeared before me, John W. Watts, United States Commissioner for the Middle District of the United States Circuit Court for the State of Alabama, Peter M. Rowland, D. C. Shultze, and R. C. Germany, who having been duly sworn before me, and who are known to me, depose and say that the facts set forth in this the foregoing petition, and in the exhibits hereto attached, are true to the best of their knowledge, information, and belief.

PETER M. ROWLAND.
D. C. SHUTZE.
R. C. GERMANY.

Sworn to and subscribed before me, this the 10th day of December, 1881.

JNO. W. WATTS,
U. S. Commissioner Middle District of the State of Alabama.

To Hon. Don A. Pardee, Judge of the Circuit Court of the United States for the Middle District of Ala., at Montgomery, Alabama.

Your petitioners, P. M. Rowland, D. C. Shutze, and R. C. Germany, respectfully show unto your honor that they, and each of them, are restrained of their liberty and are in the jail of Montgomery County, Alabama, placed there by M. C. Osborne, the marshal of the United States for the Middle District of Alabama, under process and proceedings, a copy of which is hereto attached as a part of this petition. Your petitioners allege that the order under which they have been imprisoned, as they are advised, is illegal and void, and that the proceedings upon which said order is based is illegal and void, and that the order under which they and each of them are held in custody of said marshal is beyond the jurisdiction of the hon. judge who ordered them and each of them into the custody of said marshal, and is in violation of the Constitution of the United States and of Alabama. Your petitioners, on advice of their counsel, aver that the order under which they are imprisoned is void, and that the proceedings on which said order is based, on their face, show that said order is illegal and void.

Your petitioners pray for the writ of habeas corpus to be issued by your honor, directed to the said M. C. Osborne, marshal as aforesaid, commanding him to have your petitioners before your honor at such time and place as your honor may appoint, and that your honor may hear and determine whether they are not illegally restrained of their liberty by said marshal; and they pray for such other or further relief to which they are entitled in your honor's judgment.

P. M. ROWLAND,
D. C. SHULTZ,
R. C. GERMANY,
By Attorneys.

Personally appeared before me, Wm. Seawell, a commissioner of the Circuit Court of the U. States for the Middle District of Alabama, the said Peter M. Rowland, D. C. Shutze, and R. C. Germany, who, having been by me duly sworn, deposes, each for himself, that the facts set forth in the foregoing petition are true to the best of their knowledge, information, and belief.

PETER M. ROWLAND.
D. C. SHUTZE.
R. C. GERMANY.

Sworn to and subscribed before me, this the 1st December, 1881.

WM. SEAWELL, *U. S. Comm'r.*

Application for Mandamus.

1 In the Circuit Court of the United States for the Middle District of Alabama.

EX-PARTE:
DIX AND COMPANY. } November Term, 1875.

To the Circuit Court of the United States for the Middle District of Alabama and to the judge or judges thereof presiding therein.

The petition of Dix & Company, a firm composed of Charles Dix, who is an alien and citizen or subject of Spain, residing at Havana, in the Island of Cuba, and George Crawford, who is also an alien and citizen or subject of Spain, residing at Havana, in the Island of Cuba, and Ferdinand Hucely, who is also an alien and citizen or subject of Spain and resident of Havana, in the Island of Cuba, and who together do business under the firm-name and style of Dix and Company, respectfully shows unto your honor, at the May term, A. D. 1875, to wit, on the 25th day of May, A. D. 1875, said firm of Dix and Company recovered a judg-

2 ment, for the sum of two thousand and forty and $\frac{88}{100}$ dollars, besides the further sum of fifty-one and $\frac{}{100}$ dollars, costs of suit, against the county of Chambers, in the State of Alabama, a municipal corporation duly created and organized under and by virtue of the laws of said state, and recognized as such corporation by the laws of said state;

That on, to wit, the 5th day of August, 1875, an execution, otherwise called a *fieri facias*, was regularly issued on said judgment by the clerk of said court, and under the seal of said court, and was placed by said clerk on said day last above named in the hands of Robert W. Healy, marshal of the United States for the Middle District of Alabama, to be duly executed by him as such marshal, according to the exigency and mandate thereof.

That the said execution, otherwise known and called a *fieri facias* as foresaid, has been duly returned by said marshal unto the office of the clerk of said court, on, to wit, the 6th day of

3 August, A. D. 1875, with the endorsement, "No property found."

That said judgment was obtained as aforesaid on certain coupons which were originally attached to certain bonds which were duly issued and put in circulation by said county of Chambers under and by virtue of an act of the general assembly of Alabama, entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the state as they may consider most conducive to their respective interests," approved December 31st, A. D. 1868, which said act is a public and general

statute of the State of Alabama and is still in force. And your petitioners aver that under the terms and provisions of said act the said county of Chambers was authorized and empowered to levy and assess, by and through its court of county commissioners, a tax upon the real and personal property in said county, for the payment of said coupons as the same fell due, under the provisions of section 7 of said act above mentioned. And your petitioners aver that, notwithstanding the rendition of said judgment, and the issuing of said *fieri facias* or execution as aforesaid, and notwithstanding the said court of county commissioners of said county was authorized and required to levy and assess said tax as aforesaid, the said court of county commissioners of said county have wholly neglected, failed, and refused, and still neglect, fail, and refuse to levy and assess said tax, or any part thereof.

That the court of county commissioners of said county of Chambers is composed of the following-named persons, all of whom reside in said county of Chambers, to wit: Hon. P. M. Rowland, judge of probate of said county, and ex officio the principal judge of said court of county commissioners, and R. C. Germany, J. H. Forman, W. J. Grady, and D. C. Shulze.

And your petitioners further state and aver, that said judgment is wholly unsatisfied and unreversed and that they are wholly without remedy in the premises, unless it be afforded your petitioners by the interposition of this honorable court by a writ of mandamus against said court of county *of county* commissioners, and they; *and they* therefore invoke the aid of this honorable court and pray that a writ of mandamus, or such other appropriate and remedial writ as the facts hereinbefore stated will warrant, may issue against said court of county commissioners of said county of Chambers, composed of P. M. Rowland, judge of probate as aforesaid, and R. C. Germany, J. N. Forman, W. J. Grady, and D. C. Shulze, as aforesaid, and their successors in office, commanding them to levy and assess, in accordance with the provisions of said act of the general assembly of said State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy the said judgment, with interest and costs, and that they continue to levy and assess said tax as aforesaid from time to time until said judgment is wholly satisfied, with interests and costs of suit, or that the said persons above named, constituting the court of county commissioners of said county of Chambers as aforesaid, be and appear *be and appear* before this honorable court, on the 30th day of November, 1875, at 10 o'clock A. M. of the same day, or as soon thereafter as said circuit court will hear the same, and show cause, if any they have, why they refuse to levy and assess said tax as aforesaid.

And petitioners pray for such other or further orders, writs, and reliefs in the premises, as may be authorized by the law of the

land, and as to justice may seem meet and proper. And as in duty bound your petitioners will ever pray, &c.

DIX & COMPANY,
By their Attorneys, Rice, Jones & Wiley.

The United States Circuit Court for the Middle District of Alabama.

Before me, J. W. Dimmick clerk of said Circuit Court of the United States for the Middle District of Alabama, this day
7 personally appeared A. A. Wiley, who makes oath that he is a member of the law firm of Rice, Jones & Wiley, and one of the counsel for petitioners in the foregoing cause, and that the statements and allegations contained in the foregoing petition are true, to the best of his knowledge, information, and belief.

A. A. WILEY.

Sworn to and subscribed before me, this the 15th day of November, 1875.

J. W. DIMMICK,
Clerk and U. S. Commissioner.

Filed this 15th day of November, A. D. 1875.

J. W. DIMMICK, *Clerk.*

Order of Court.

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1875.

DIX & COMPANY
vs.
THE COURT OF COUNTY COMMISSIONERS OF CHAMBERS County, Alabama. Composed of P. M. Rowland, Judge of Probate, and ex officio Judge
8 of said Court of County Commissioners, and J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shulze.

And now come the plaintiffs, Dix & Company, composed of Charles Dix, George Crawford, and Ferdinand Hincely, who are all aliens, and citizens or subjects of Spain, residing at Havana, in the Island of Cuba, and present and file their petition for a mandamus, against the said court of county commissioners, and their successors in office, and the court being fully advised in and of the premises, it is ordered that an alternative writ of mandamus issue to the said court of county commissioners of the county of Chambers, returnable to this court on the 23rd day of November, inst., commanding said court of county commissioners, and their successors in office, to levy and assess, in accordance with the provisions of an act of the general assembly of the State of Alabama,
9 entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the state as they may consider

statute of the State of Alabama and is still in force. And your petitioners aver that under the terms and provisions of said act the said county of Chambers was authorized and empowered to levy and assess, by and through its court of county commissioners, a tax upon the real and personal property in said county, for the payment of said coupons as the same fell due, under the provisions of section 7 of said act above mentioned. And your petitioners aver that, notwithstanding the rendition of said judgment, and the issuing of said *fieri facias* or execution as aforesaid, and notwithstanding the said court of county commissioners of said county was authorized and required to levy and assess said tax as aforesaid, the said court of county commissioners of said county have wholly neglected, failed, and refused, and still neglect, fail, and refuse to levy and assess said tax, or any part thereof.

That the court of county commissioners of said county of Chambers is composed of the following-named persons, all of whom reside in said county of Chambers, to wit: Hon. P. M. Rowland, judge of probate of said county, and ex officio the principal judge of said court of county commissioners, and R. C. Germany, J. H. Forman, W. J. Grady, and D. C. Shulze.

And your petitioners further state and aver, that said judgment is wholly unsatisfied and unreversed and that they are wholly without remedy in the premises, unless it be afforded your petitioners by the interposition of this honorable court by a writ of mandamus against said court of county *of county* commissioners, and they; *and they* therefore invoke the aid of this honorable court and pray that a writ of mandamus, or such other appropriate and remedial writ as the facts hereinbefore stated will warrant, may issue against said court of county commissioners of said county of Chambers, composed of P. M. Rowland, judge of probate as aforesaid, and R. C. Germany, J. N. Forman, W. J. Grady, and D. C. Shulze, as aforesaid, and their successors in office, commanding them to levy and assess, in accordance with the provisions of said act of the general assembly of said State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy the said judgment, with interest and costs, and that they continue to levy and assess said tax as aforesaid from time to time until said judgment is wholly satisfied, with interests and costs of suit, or that the said persons above named, constituting the court of county commissioners of said county of Chambers as aforesaid, be and appear *be and appear* before this honorable court, on the 30th day of November, 1875, at 10 o'clock A. M. of the same day, or as soon thereafter as said circuit court will hear the same, and show cause, if any they have, why they refuse to levy and assess said tax as aforesaid.

And petitioners pray for such other or further orders, writs, and reliefs in the premises, as may be authorized by the law of the

land, and as to justice may seem meet and proper. And as in duty bound your petitioners will ever pray, &c.

DIX & COMPANY,
By their Attorneys, Rice, Jones & Wiley.

The United States Circuit Court for the Middle District of Alabama.

Before me, J. W. Dimmick clerk of said Circuit Court of the United States for the Middle District of Alabama, this day
7 personally appeared A. A. Wiley, who makes oath that he is a member of the law firm of Rice, Jones & Wiley, and one of the counsel for petitioners in the foregoing cause, and that the statements and allegations contained in the foregoing petition are true, to the best of his knowledge, information, and belief.

A. A. WILEY.

Sworn to and subscribed before me, this the 15th day of November, 1875.

J. W. DIMMICK,
Clerk and U. S. Commissioner.

Filed this 15th day of November, A. D. 1875.

J. W. DIMMICK, *Clerk.*

Order of Court.

In the Circuit Court of the United States for the Middle District of Alabama, November Term, 1875.

DIX & COMPANY
vs.
THE COURT OF COUNTY COMMISSIONERS OF CHAMBERS County, Alabama. Composed of P. M. Rowland, Judge of Probate, and ex officio Judge
8 of said Court of County Commissioners, and J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shulze.

And now come the plaintiffs, Dix & Company, composed of Charles Dix, George Crawford, and Ferdinand Hincely, who are all aliens, and citizens or subjects of Spain, residing at Havana, in the Island of Cuba, and present and file their petition for a mandamus, against the said court of county commissioners, and their successors in office, and the court being fully advised in and of the premises, it is ordered that an alternative writ of mandamus issue to the said court of county commissioners of the county of Chambers, returnable to this court on the 23rd day of November, inst., commanding said court of county commissioners, and their successors in office, to levy and assess, in accordance with the provisions of an act of the general assembly of the State of Alabama,
9 entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the state as they may consider

most conducive to their respective interests," approved December 31st, 1868, such a tax upon the real and personal property of said county, not to exceed one per cent. per annum upon the real and personal property in said county, as yearly assessed, and returned to the proper officers of said county, as will be sufficient to satisfy said judgment in said petition mentioned, together with the interest thereon, and the costs of suit, or that said court of county commissioners, or their successors in office, show cause before this court, on the 30th day of November, 1875, at 10 o'clock A. M. of that day, or as soon thereafter as said court will hear the same, why they have not done so.

November 15th, 1875. W. B. WOODS, *Judge.*

Filed this 15th day of November, A. D. 1875, in open court.
J. W. DIMMICK, *Clerk.*

Alternative Writ of Mandamus.

In the Circuit Court of the United States for the Middle District of Alabama.

EX-PARTE: DIX & CO. } November Term, 1875.

To P. M. Rowland, Judge of Probate of Chambers County, Alabama, and ex officio Judge of the Court of County Commissioners of said county, and J. W. Forman, R. C. Germany, W. J. Grady, and D. C. Shulze, members of said court of county commissioners.

Whereas it has been made known to us, by an application in writing and under oath, filed in office on the 15th day of November, A. D. 1875, by Dix & Co., a firm composed of Charles Dix, George Crawford, and Ferdinand Hincely, who are aliens and citizens or subjects of Spain, residing at Havana, in the Island of Cuba, and who together do business under the firm-name and style of Dix & Company—

1. That at the May term, A. D. 1875, to wit, on the 25th
11 day of May, A. D. 1875, said petitioners, Dix & Company, recovered a judgment for the sum of two thousand and forty and $\frac{58}{100}$ dollars, besides the further sum of fifty-one $\frac{}{100}$ dollars costs of suit, against the said county of Chambers, a municipal corporation, duly created and organized under and by virtue of the laws of said state.

2. That on, to wit, the 5th day of August, 1875, an execution, otherwise called a *fieri facias*, was regularly issued on said judgment by the clerk of said court, and under the seal of said court, and was placed by said clerk, on said day last above named, in the hands of Robert W. Healy, marshal of the United States for the Middle District of Alabama, to be duly executed by him as such marshal, according to the exigency and mandate thereof.

3. That the said execution, otherwise known and called a *fieri facias* as aforesaid, has been duly returned by said marshal into the office of the clerk of said court, on, to wit, the 6th day of August, A D. 1875, with the indorsement thereon "No property found."

12 That said judgment was obtained as aforesaid on certain coupons, which were originally attached to certain bonds, which were duly issued and put in circulation by said county of Chambers, under and by virtue of an act of the general assembly of Alabama, entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the state as they may consider most conducive to their respective interests," approved December 31st, A. D. 1868, which said act is a public and general statute of the State of Alabama, and is still in force; and that, under the terms and provisions of said act, the said county of Chambers was authorized and empowered to levy and assess, by and through its court of county commissioners, a tax upon the real and personal property in said county for the payment of said coupons as the same fell due, under the provisions of section 7 of said act above mentioned.

13 5th. That notwithstanding the rendition of said judgment and the issuing of said *fieri facias* or execution as aforesaid, and notwithstanding the said court of county commissioners of said county was duly authorized and required *and required* to levy and assess said tax as aforesaid, the said court of county commissioners of said county have wholly neglected, failed, and refused, and still neglect, fail, and refuse to levy and assess said tax or any part thereof.

6th. That the court of county commissioners of said county of Chambers is composed of the following-named persons, all of whom reside in said county of Chambers, to wit: The Hon. P. M. Rowland, judge of probate of said county, and ex officio the principal judge of said court of said county commissioners, and R. C. Germany, J. H. Forman, W. J. Grady, and D. C. Shulze.

That said judgment is wholly unsatisfied and unreversed, and that they are wholly without remedy in the premises, unless it be afforded to said petitioners, Diggs & Co., by the interposition of this court

14 by a writ of mandamus against said court of county commissioners; and they, therefore, invoke the aid of this court, and pray that a writ of mandamus, or such other appropriate writ as the facts hereinbefore stated will warrant, may issue to said court of county commissioners of said county, and to the individual members composing said court as above named, and their successors in office, commanding them to levy and assess, in accordance with the provisions of said act of the general assembly, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy the said judgment, with

interest and costs; and that they continue to levy and assess said tax as aforesaid, from time to time, until said judgment is wholly satisfied, with interest and costs of suit. Now,—

8. Therefore, you, the said P. M. Rowland, judge as aforesaid, and R. C. Germany, J. H. Forman, W. J. Grady, and D. C. Shutze, members of and composing the court of county commissioners of said county, are hereby commanded to levy and assess, in
15 accordance with the provisions of said act of the general assembly of said State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy the said judgment, with interest and costs, and that they continue to levy and assess said tax as aforesaid, from time to time, until said judgment is wholly satisfied, with interests and costs of suit; or that you, the said persons above named, constituting the court of county commissioners of said county of Chambers as aforesaid, be and appear before this court on the 3d day of December, 1875, at 10 o'clock A. M. of the same day, or as soon thereafter as said circuit court will hear the same, and show cause, if any you have, why you should not be required to levy said tax.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 19th day of November, in the year of our Lord one thousand eight hundred and seventy-five.

Issued the 19th day of November, in the year of our Lord
16 one thousand eight hundred and seventy-five.

[SEAL.] J. W. DIMMICK,
Clerk U. S. Cir. Ct. Mid. Dist. Ala.

Executed by serving a copy of the within on J. H. Forman and Robert C. Germany, on 30th November, 1875. Also a copy of the within on A. J. Grady and D. C. Shutze, on the 1st day of Dec., 1875. And also a copy of the within on P. M. Rowland, on Dec'r 2d, 1875. R. W. HEALY, *U. S. Marshal*,
By J. D. WILLIFORD, *Dep'y.*

In the Circuit Court of the United States for the Middle District of Alabama.

DIX AND COMPANY
vs.
THE COURT OF COUNTY COMMISSIONERS OF CHAMBERS County, Ala., composed of P. M. Rowland, Judge of Probate, and ex officio Judge of the Court of County Commissioners, and J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shulze.

17 This cause came on to be heard at a former day of this term of the court, to wit, on the 9th day of December, 1875, and came the plaintiffs, Dix and Company, composed of

Charles Dix, George Crawford, and Ferdinand Hinceley, who are all aliens and citizens or subjects of Spain, residing at Havana, in the Island of Cuba, and by them, their attorneys, Rice, Jones & Wiley, move the court for a peremptory writ of mandamus against said court of county commissioners of Chambers County, and against each and every member of said court of county commissioners, and their successors in office; and the court being fully advised of and in the premises from the papers on file in the office of the clerk of this court, which are here referred to and made a part of this judgment entry, it is now, therefore, considered and ordered by this court that a peremptory writ of mandamus issue forthwith and without delay to and against the said court of county commissioners, and every member of said court, and to their successors in office, commanding them to levy, assess, and cause
18 to be collected, in accordance with the provisions of said act of the general assembly of the State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy said judgment, with interest and costs, and that they continue to levy, assess, and cause the collection of said tax as aforesaid, from time to time, until said judgment is wholly satisfied, with interests and costs of suit, and that said court of county commissioners shall make known to this court, and to the judge of this court, at the next term thereof, to wit, on the first day of May, A. D. 1876, how they have executed this writ.

19 *Peremptory Writ of Mandamus.*

In the Circuit Court of the United States for the Middle District of Alabama.

DIX AND COMPANY
vs.
THE COMMISSIONERS' COURT OF CHAMBERS COUNTY, composed of P. M. Rowland, Judge of Probate and ex officio Judge of the Court of County Commissioners of said county, and J. N. Forman, R. C. Germany, and D. C. Shulze, and W. J. Grady, members of said Court of County Commissioners.

To P. M. Rowland, Judge of Probate of Chambers County, Alabama, and ex officio Judge of the Court of County Commissioners of said county, and J. W. Forman, R. C. Germany, W. J. Grady, and D. C. Shutze, members of said court of county commissioners.

Whereas it has been made known to us, by an application in writing and under oath, filed in office on the 15th day of November, A. D. 1875, by Dix & Company, a firm composed of Charles

Dix, George Crawford, and Ferdinand Hinceley, who are
20 aliens and citizens or subjects of Spain, residing at Havana,
in the Island of Cuba, and who together do business under the firm-name and style of Dix and Company—

That at the May term, A. D. 1875, to wit, on the 25th day of May, A. D. 1875, said petitioners, Dix & Company, recovered a judgment for the sum of two thousand and forty and $\frac{58}{100}$ dollars, besides the further sum of fifty-one & $\frac{00}{100}$ dollars costs of suit, against the said county of Chambers, a municipal corporation duly created and organized under and by virtue of the laws of said state, and recognized as such corporation by the laws of said state; and—

2. That on, to wit, the 5th day of August, 1875, an execution, otherwise called a *fieri facias*, was regularly issued on said judgment by the clerk of said court, and under the seal of said court, and was duly placed by said clerk, on said day last above named, in the hands of Robert W. Healy, marshal of the United States for the Middle District of Alabama, to be duly executed by
21 him as such marshal, according to the exigency and mandate thereof; and—

3. That the said execution, otherwise known and called a *fieri facias*, as aforesaid, has been duly returned by said marshal into the office of the clerk of said court, on, to wit, the 6th day of August, A. D. 1875, with indorsement thereon, "No property found;" and—

4. That said judgment was obtained, as aforesaid, on certain coupons, which were originally attached to certain bonds, which were duly issued and put in circulation by said county of Chambers, by and through her proper officers, and under and by virtue of an act of the general assembly of Alabama, entitled "An act 'to authorize the several counties and towns and cities of the State 'of Alabama to subscribe to the capital stock of such railroads 'throughout the state as they may consider most conducive to 'their respective interests," approved December 31st, A. D. 1868, which said act is a public and general statute of the State of Alabama, and is still in force; and that under the terms and provisions of said act the said county of Chambers was author-
22 ized and empowered to levy and assess, by and through its court of county commissioners, a tax upon the real and personal property in said county for the payment of said coupons as the same fell due, under the provisions of section 7 of said act above mentioned; and—

5. That notwithstanding the rendition of said judgment and the issuing of said *fieri facias* or execution, as aforesaid, and notwithstanding the said court of county commissioners of said county was duly authorized and required to levy and assess said tax, they have wholly neglected, failed, and refused, and still neglect, fail, and refuse to levy and assess said tax or any part thereof; and—

6. That the court of county commissioners of Chambers County is composed of the following-named persons, all of whom reside in said county of Chambers, to wit: the Hon. P. M. Rowland, judge of probate of said county and ex officio the principal judge of said court of said county commissioners, and R. C. Germany, J. H. Forman, W. J. Grady, and D. C. Shutze;

23 And 7. That said judgment is wholly unsatisfied and unreversed, and that they are wholly without remedy in the premises, unless it be afforded to petitioners, the said Dix and Company, by the interposition of this court, by a writ of mandamus, against said court of county commissioners of said county of Chambers, and the individual members thereof; and they, therefore, invoke the aid of this court to grant an alternative writ of mandamus directed to said court of county commissioners, and to each individual member composing said court as above named, and their successors in office, commanding them to levy and assess in accordance with the provisions of said act of the general assembly of Alabama, such a tax upon the real and personal property in said county of Chambers, as will be sufficient to satisfy the said judgment, with interest and costs, and that they continue to levy and assess said tax, as aforesaid, from time to time, until said judgment is wholly satisfied. And, whereas, it further appears unto us that *a rule nisi* or said alternative writ of mandamus was

24 duly issued on, to wit, the 19th day of November, A. D. 1875, made returnable to said court on the 3d of December, 1875, directed to the court of county commissioners of said county of Chambers, and to the individuals composing said court of county commissioners, commanding them to be and appear before this court on said day last above named, to show cause, if any they have, why a peremptory writ of mandamus should not be issued and awarded against them, commanding them to levy and assess said tax, above named, to meet and satisfy judgment, with interest and cost; and said application for a peremptory writ of mandamus against said court of county commissioners having been duly heard and determined, by the Honorable John Bruce, judge of the United States District Court for the Middle District of Alabama, then holding and presiding over the United States Circuit for said Middle District of Alabama: Now, therefore, you,

25 the said P. M. Rowland, judge as aforesaid, and R. C. Germany, J. N. Forman, W. J. Grady, and D. C. Shutze, members of and composing the court of county commissioners of said county, are hereby commanded forthwith and without delay to levy and assess and cause the collection of in accordance with the provisions of said act of the general assembly of said State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy said judgment, with interest and costs, and that you continue to levy and assess said tax and cause the same to be collected, as aforesaid, from time

to time, until said judgment is wholly satisfied, with interest and costs of suit, and how you shall have executed this writ, make known to us, to the judge of this court, at the next term of said court, on the first day of said term, on, to wit, on the first day in May, A. D. 1876.

Witness the Honorable Morrison R. Waite, Chief Jus-
[SEAL.] tice of the Supreme Court of the United States, this 17th day of December, A. D. 1875.

26 J. W. DIMMICK,
Clerk U. S. Circuit Court for the Middle District of Ala.

Filed this 10th day of March, A. D. 1876.
J. W. DIMMICK, *Clerk.*

Rec'd Dec. 17, '75, and executed by serving copies on the deft's, P. M. Rowland, judge of probate, and J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shutze, composing the court of county commissioners of Chambers Co., Ala., this 14th day of February, 1876.

R. W. HEALY, *U. S. Marshal,*
By J. D. WILLIFORD, *Deputy.*

Return of Com'r Court to Peremptory Writ.

To the Honorable the Circuit Court of the United States for the Middle District of Alabama.

The commissioners' court of Chambers County, Alabama, in pursuance of a peremptory mandamus issued by said circuit court, on the 17th day of December, 1875, have levied the tax as
27 therein required, as will be seen from the annexed order which has been placed upon the records of said court. All of which is respectfully submitted.

P. M. ROWLAND,
Judge of Probate, &c.

At a regular adjourned term of the commissioners' court, begun and held for Chambers County, Ala., on Monday, the 24th day of April, 1876. Present: the Honorable Peter M. Rowland, judge of probate court, D. C. Shutze, J. H. Forman, W. J. Grady, and R. C. Germany, when the following proceedings were had, to wit:

On the 17th day of December, 1875, a peremptory mandamus was issued out of the Circuit Court of the United States at Montgomery, Ala., and executed on the commissioners of said county on the 14th Feby., 1876, at the suit of Dix and Co., commanding the commissioners' court of Chambers County to levy a tax for the pur-

pose of paying a judgment in said court in favor of said Dix & Co. against said county, rendered at the May term, 1875, for
28 the sum of two thousand and forty $\frac{58}{100}$ dollars, and fifty-one dollars costs, and that they report their action in the premises to the May term, 1876, of said court. Now, as required by said order, it is ordered that a tax of one-fourth of one per cent. on the value of the real and personal property of Chambers County be levied for the purposes above set forth, and that the tax collector proceed to collect said tax as required by law.

Filed this the 3d day of May, A. D. 1876.

J. W. DIMMICK, *Clerk.*

DIX & COMPANY
17. *vs.* } May 23, 1881.
THE COURT OF COUNTY COMMISSIONERS of Chambers Co., Ala.

This day came the plaintiffs by their attorneys, and duly apply to and move the court for the issuance out of this court of a rule to the said court of county commissioners of Chambers County, as well as to the members thereof, that is to say, to P. M. Rowland, judge of probate and ex officio judge of the said court of county commissioners, and to J. N. Foreman, R. C. Germany, W. J. Grady, and D. C. Shutze, who were members of and together constituted said court of county commissioners of said county of Chambers at the time of the due and proper service upon them and each of them, on, to wit, the 14th day of February, 1876, of a peremptory writ of mandamus issued in said cause, as well as to each of the aforenamed members of said court of county commissioners, to appear instanter, as soon as duly served, and then and there show cause, if any they have, why an attachment should not issue against them and each of them for violating and disobeying the said peremptory writ of mandamus issued to and against them in said cause and duly served on them as aforesaid, commanding them forthwith, and without delay, to levy and assess, and cause the collection of, in accordance with the provisions of the act of the general assembly of Alabama, therein particularly alluded to, such a tax upon the real and personal property in said county of Chambers as would be sufficient to satisfy a judgment, obtained by plaintiffs in said cause, on the 25th day of May, 1875, for $2,040.58, besides interest and costs, and that they should continue to levy and assess said tax, and cause the same to be collected as aforesaid from time to time until said judgment should be wholly satisfied, with interest and costs of suit, and sufficient cause being shown to the court for the issuance of the rule moved for as aforesaid, it is therefore and thereupon ordered that the rule moved for be issued instanter and be served and returned without delay."

JOHN BRUCE, *Judge.*

Order to show Cause.

In the United States Circuit Court for the Middle District of Alabama.

To the court of county commissioners of Chambers County, Alabama, as well as to the several members thereof, that is to say, to P. M. Rowland, judge of the probate court of said county and ex officio a member of said court of county commissioners of said county, and to J. N. Forman, R. C. Germany, to J. Grady and D. C. Shutze, members of and who together constituted
29 said court of county commissioners of Chambers County, on, to wit, the 14th day of February, 1876, as hereinafter mentioned, as well as to each of the above-named persons, greeting:

Whereas, at the present term of this court, to wit, on the 23d day of May, A. D. 1881, the following order was made and entered of record:

DIX & COMPANY
17. *vs.*
THE COURT OF COUNTY COM'RS OF Chambers Co., Ala.

This day came the plaintiffs, by their attorneys, and duly apply to and move the court for the issuance out of this court of a rule to the said court of county commissioners of Chambers County, as well as to the members thereof, that is to say, to P. M. Rowland, judge of probate and ex officio judge of the said court of county commissioners, and to J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Shutze, who were members of and together constituted said court of county commissioners of said county of Chambers at the time of the due and proper service upon them and each
30 of them, on, to wit, the 14th day of February, 1876, of a peremptory writ of mandamus issued in said cause, as well as to each of the aforenamed members of said court of county commissioners, to appear instanter, as soon as duly served, and then and there show cause, if any they have, why an attachment should not issue against them and each of them for violating and disobeying the said peremptory writ of mandamus issued to and against them in said cause, and duly served on them as aforesaid, commanding them forthwith and without delay, to levy and assess, and cause the collection of, in accordance with the provisions of the act of the general assembly of Alabama, therein particularly alluded to, such a tax upon the real and personal property in said county of Chambers as would be sufficient to satisfy a judgment obtained by plaintiffs in said cause on the 25th day of May, 1875, for $2,040.58, besides interest and costs, and that they should continue to levy and assess said tax, and cause the same to be col-

lected as aforesaid, from time to time until said judgment
31 should be wholly satisfied, with interest and costs of suit, and sufficient cause being shown to the court for the issuance of the rule moved for as aforesaid. It is therefore and thereupon ordered that the rule moved for be issued instanter and be served and returned without delay.

Now, therefore, you, and each of you, are hereby commanded to be and appear before this honorable court, instanter, to show cause, if any you have, why an attachment should not issue against you, and each of you, for violating and disobeying said peremptory writ of mandamus, as well as failing and neglecting to obey the same: of all of which you, and each of you, *and each of you*, will take due notice thereof and govern yourselves accordingly.

Witness the Hon. Morrison R. Waite, Chief Justice of
[L. S.] the Supreme Court of the United States, and the seal of said circuit court, this 25th day of May, A. D. 1881.

J. W. DIMMICK,
Clerk U. S. Cir. Court Mid. Dist. of Ala.

32 *Return to rule nisi.*

In the Circuit Court of the United States for the Middle District of Alabama.

EX-PARTE: DIX & CO. } May Term, 1881.

In this case a rule nisi having, on the 25th day of May, 1881, issued out of said court, commanding P. M. Rowland, as probate judge of Chambers Co., Ala., and ex officio a member of the court of county commissioners in and for said county, and J. M. Forman, R. C. Germany, W. J. Grady, and D. C. Shutze, members of said court of county commissioners, to appear instanter, or as soon as duly served with said rule nisi, and show cause why an attachment should not issue against them, and each of them, for violating and disregarding the peremptory writ of mandamus heretofore issued and served upon them at the suit of said Dix & Co., the said P. M. Rowland, judge of probate and ex-officio a member of said court, as aforesaid, begs leave to make the following return, and to show cause under oath as follows, why
33 he should not be attached for contempt of the said circuit court of the United States:

He respectfully states that he was, at the service of said peremptory writ of mandamus, has ever since been, and is now, judge of the court of probate in and for said county of Chambers, and, as such, ex officio a member of the court of county commissioners in and for said county, and that on the 24th day of April, 1876, the court of county commissioners of said county of Chambers, at a regular term of said court, levied a tax of one-fourth of one per cent. on the assessed value of the real and personal property of

the taxpayers of said county of Chambers, to pay off and discharge the judgment mentioned in the peremptory writ of mandamus issued and served on him and the members of said court, as aforesaid, which said levy is sufficient to pay off and discharge said judgment, together with all interest and costs of suit—the assessed value of the taxable property of said county for said year 1876 being one million six hundred and thirty-one thousand
34 five hundred and sixty-six dollars, and the levy of one-fourth of one per cent. thereon is more than sufficient to pay off and discharge the judgment, together with all interest and costs. A copy of said levy is hereto attached, marked "Exhibit A," and made part of this return. Affiant, said P. M. Rowland, gave notice to J. G. Weaver, the then tax-collector of said county, and requested him to collect the said one-fourth of one per cent., levied as aforesaid for the purpose aforesaid. Said J. G. Weaver, tax-collector, as aforesaid, refused to collect said taxes upon the ground that he had previously qualified under the act of the legislature of Alabama, approved on the 4th day of March, 1876, by giving a bond for the collection of the state and county taxes, for general and not for special purposes; and his successor, J. M. Driver, who is the present tax-collector of said county, executed his official bond in the same manner, and has upon the same ground refused to collect said special taxes, so levied by said court, as aforesaid; and that the said P. M. Rowland notified the
35 governor of Alabama, in the manner and within the time provided by law, of the failure of each of said tax-collectors to make a bond for the collection of special taxes. The said P. M. Rowland has done all that the law authorized him to do in relation to the levy and collection of said taxes. Under the laws of Alabama, the said P. M. Rowland, as judge of probate of Chambers County and ex officio a member of the court of county commissioners of said county, is simply the presiding officer of the said court of county commissioners, and has no authority to vote as a member of said court, except in cases of a tie, a thing that has not occurred in any matter growing out of the assessment or collection of the said special taxes to pay said judgment, as aforesaid. If in any thing affiant has been mistaken in his duties in the premises, he is willing to correct his mistakes and do whatever this honorable court may require. At no time has said P. M. Rowland been actuated by any intention to disobey the
36 mandate of this honorable court, and if he has omitted any duty, it has been through mistake of his official duties, and not from any attempt to evade or oppose the authority of this honorable court. All of which is respectfully submitted.

PETER M. ROWLAND.

Sworn to and subscribed before me, this day of June, 1881.

J. W. DIMMICK,
U. S. Com'r Mid. Dist. of Ala.

R. C. Germany and D. C. Shutze show cause as follows why they should not be attached for contempt of said circuit court for disobedience to the peremptory writ of mandamus mentioned in the above return of P. M. Rowland: Wm. J. Grady and James H. Forman were members of the court of county commissioners of said county of Chambers on the 24th day of April, 1876, and on that day, in obedience to the peremptory writ of mandamus, mentioned in the above return of P. M. Rowland, the said Germany, Shultze, Forman, and Grady, who constituted said
37 court of county commissioners, on said day, at a regular term of said court, levied one-fourth of one per cent. upon the assessed value of the real and personal property of the tax-payers of said county of Chambers, to pay off and discharge the judgment mentioned and described in the peremptory writ of mandamus served on them, together with all the interest due on said judgments, and the costs of suit, and instructed the then tax-collector to collect the same. Said levy was sufficient to pay off said judgment, as shown by the return of said P. M. Rowland, and the then tax-collector, and his successor in office, the present tax-collector of said county, have refused to collect the same, for the reasons set forth in the return of Judge P. M. Rowland, above set forth.

Sometime in the year 1878 J. H. Forman, and sometime in the year 1880 Wm. J. Grady, died, and John H. Seroyer and John H. Higgins have been elected as their successors in office, and are now members of the court of county commissioners of said county.

38 Affiants further state that they are plain men, not learned in the law; that they never knew that there was any other duty devolving on them in relation to the collection of said tax than the levy of a sufficient tax to pay said judgment, with interest and costs of suit, until the service of the rule nisi in the present case.

Affiants honestly believed that when they had levied said tax and ordered the tax-collector to collect the same, they had done all they were required to do, and until the service of the rule nisi, they did not know they were required to do anything more; and whatever duty they may have omitted to perform, was omitted through innocent or ignorant mistake of their duties; that they are willing and now offer to perform any and every duty required of them in relation to causing said taxes to be collected. All of which is respectfully submitted.

D. C. SHUTZE.
R. C. GERMANY.

Sworn to and subscribed before me, this 14 day of June, 1881.

J. W. DIMMICK,
U. S. Com'r for said Mid. Dist. of Ala.

39 *Exhibit A.*

At a regular adjourned term of the commissioners' court, begun and held for Chambers County, Alabama, on Monday, the 24th day of April, 1876. Present, Hon. Peter M. Rowland, judge of probate court; D. C. Shutze, J. H. Foreman, W. J. Grady, and R. C. Germany, commissioners, when the following proceedings were had, to wit:

On the 17th day of December, 1875, a peremptory mandamus was issued out of the circuit court of the United States at Montgomery, Ala., and executed on the commissioners of said county on the 14th Feb'y, 1876, at the suit of Dix & Co., commanding the Commissioners' Court of Chambers County to levy a tax for the purpose of paying a judgment in said court in favor of said Dix & Co., against said county, rendered at the May term, 1875, for the sum of two thousand and forty and $\frac{58}{100}$ dollars, and fifty-one dollars costs, and that they report their action in the premises to the May term, 1876, of said court.

40 Now, as required by said order, it is ordered that a tax of one-fourth of one per cent. on the value of the real and personal property of Chambers County be levied for the purposes above set forth, and that the tax-collector proceed to collect said tax as required by law.

THE STATE OF ALABAMA, }
CHAMBERS COUNTY. }

I, Peter M. Rowland, judge of the probate court, and ex officio principal judge of the Commissioners' Court of Chambers County, Ala., hereby certify that the foregoing pages numbered 1 and 2, inclusive, contain a full, true, and complete transcript of an order of the commissioners' court of said county, entered on the 24th day of April, 1876, as the same appears of record.

Witness my hand, this the 31st day of May, 1881.

PETER M. ROWLAND,
Judge of Probate and ex officio Judge of the Commissioners' Court.

Filed July 16th, 1881. J. W. DIMMICK, *Clerk.*

41 *Order Adjudging Respondents Guilty of Contempt.*

DIX & CO.
vs.
P. M. ROWLAND, JUDGE OF PROBATE, &C.; D. C. Shutze, and R. C. Germany, as members of the Court of County Commissioners of Chambers County, Alabama.

Rule to show cause why respondents should not be attached for contempt of court.

This cause came on to be heard upon the rule to show cause why the respondents above named should not be punished for

contempt of court, for failing to obey the peremptory writ of mandamus heretofore awarded against and duly served upon each of them. And thereupon respondents, appearing by Wm. H. Smith, esq., their attorney, moved to quash the rule to show cause, which motion was overruled. The respondents then filed their respective answers to said rule, which were considered and held in all respects to *be* insufficient, and to furnish no excuse or exon-
42 eration for their failure to obey said writ; said *said* respondents, P. M. Rowland, D. C. Shutze, and R. C. Germany, are then adjudged to be guilty of contempt of this court in relation to said writ, but sentence is hereby suspended and this cause continued until the next term of the court, in order that said respondents may have an opportunity by that time to pay said judgment, with interest and costs; and said respondents are each required to be and appear before this court upon the first day of the next term of this court, to wit, upon Monday, the 7th day of November, A. D. 1881, at 12 o'clock M., to certify obedience to this order, and to receive such sentence as the court may deem meet to pronounce in the premises.

July 16th, 1881. JOHN BRUCE, *Judge.*

Filed July 16th, 1881.

J. W. DIMMICK, *Clerk.*

43 DIX AND COMPANY
vs.
P. M. ROWLAND, JUDGE OF PROBATE OF Chambers County, D. C. Shutze, and R. C. Germany, members of the court of county commissioners of said county of Chambers, in the State of Alabama. } November 21st, 1881, proceeding by attachment for contempt.

In this proceeding by attachment for contempt, all the parties this day appeared in this court and were further heard by this court touching the matters of contempt involved in this proceeding; and it appearing to the court, that at the last term of this court, to wit, on July 16th, 1881, the respondents, the said Rowland, Shutze, and Germany, were fully heard as to the said matters of contempt in disobeying the said peremptory writ of mandamus duly issued out of this court, theretofore to them, and duly served on them, and that upon said hearing the said respondents
44 were duly and properly adjudged and found by this court to be guilty of contempt of this court in relation to said peremptory writ of mandamus mentioned in this proceeding for contempt, and in disobeying said last-named writ, but that said respondents were required to appear in this court on the first day of this term, to receive such sentence as this court may deem meet to pronounce in the premises. And it is now made further to appear to this court, that said respondents have not obeyed said peremptory

writ of mandamus, nor certified any such obedience, but still continue to disobey said writ of peremptory mandamus, and that said respondents are guilty of said contempt in disobeying said peremptory writ of mandamus, and that the judgment of said Dix & Company mentioned in that writ, and in respect to which that writ was issued, remains wholly unpaid and unsatisfied, and of full force, and that the amount due upon said last-mentioned judgment, including the principal and lawful interest thereon,
45 and the costs up to this day is ($3,152) thirty-one hundred and fifty-two dollars—

It is, therefore, considered, ordered, and adjudged, by this court, that the said respondents, the said P. M. Rowland, D. C. Shutze, and R. C. Germany, are guilty of said contempt in disobeying as well as in continuing to disobey the said peremptory writ of mandamus, and the order and command of this court therein, and that for said contempt each of respondents is here and now sentenced by this court to pay to the United States, as a fine for his said contempt, the sum of one thousand and eighty-eight dollars, and to be and to stand imprisoned in the common jail of Montgomery County, in the State of Alabama, until the said fine hereby imposed upon him, and all the costs of this proceeding for contempt are paid; that in addition to said fines hereby imposed upon each of said respondents respectively, the sentence of this court also is, that said respondents pay all the costs of this proceed-
46 ing, and stand imprisoned, as aforesaid, until the whole of said costs shall be paid. But the court further orders and adjudges, that if the said judgment of said Dix & Co., under and in respect to which said peremptory writ of mandamus issued, and also all the costs of this proceeding and of the proceedings in which said peremptory mandamus issued, shall hereafter be paid and satisfied in full, and such satisfaction be entered on the execution docket or minutes of this court before the said fines are paid, then and in that event all further proceedings under said sentence of this court shall thereupon cease, and the said respondents shall thence be discharged from imprisonment under said sentence.

JOHN BRUCE, *Judge.*

Filed November 23d, 1881.

J. W. DIMMICK, *Clerk.*

47 Circuit Court of the United States for the Middle District of Alabama.

I, J. W. Dimmick, clerk of the Circuit Court of the United States for the Middle District of Alabama, hereby certify that the foregoing, contained on pages numbered from one to 46, inclusive, contain a full, true, and correct transcript of the mandamus, and the proceedings thereon in this court, in the case of Dix & Co. vs.

The Court of County Commissioners of Chambers County, as the same appears of record and on file in my office as such clerk; and also of the record and proceedings in this court in the case of Dix & Co. vs. P. M. Rowland, judge of probate, and D. C. Shutze and R. C. Germany, commissioners of Chambers County, on a proceeding for contempt, as appears from the records and papers on file in this court.

Witness my hand and the seal of said Circuit Court of the United States, this the 1st day of Dec'r, A. D. 1881.

[SEAL.] J. W. DIMMICK, *Clerk, &c.*

[Endorsed on back:] Petition of P. M. Rowland, D. C. Shultze, R. C. Germany.

Dec. 1st, 1881, Montgomery, Ala.—This petition was presented to me this day at 3 P. M. I decline to issue the writ, because engagements previously made require me to leave for Atlanta without time to hear the same.

DON A. PARDEE,
Circuit Judge.

Ex Parte, The State of Alabama.

To the Honorable the Supreme Court of the United States:

The petition of the State of Alabama, by Rufus W. Cobb, the Governor of said State, respectfully represents that on 23d day of November, 1881, Peter M. Rowland, D. C. Shultze and R. C. Germany, who are citizens of Alabama, were committed to the common jail of Montgomery County by the order of the Circuit Court of the United States for the Middle District of Alabama, and there they are now imprisoned in said jail.

2. That the order for the commitment and imprisonment of said persons, made by said court, and all the proceedings had in said court upon which said order is based, appear fully and at large in a copy of the record of said court, duly certified, which is made an exhibit to and part of this petition.

3. From which record it fully appears, as petitioner is advised and believes, and so states that said persons are so deprived of their liberty and are now in prison in violation of law.

4. Petitioner further states, on like information and belief, that said order of imprisonment is in law null and void, because the Circuit Court of the United States, in the proceedings set forth in said record, has no power to imprison the said Peter M. Rowland, who was at the date of said order the Judge of Probate of the county of Chambers, in said State, duly qualified and acting as such, and he still holds said office and has the sole right to exercise the duties thereof; and that said Circuit Court has no power under said proceedings to imprison D. C. Shultze and R. C. Germany, who are members of the Court of County Commissioners of Chambers County, Alabama, and were such when said order was made, and said court is a court of record under the laws of Alabama. Petitioner further states that the imprisonment inflicted upon said judicial officers of the State of Alabama, who hold their commissions under and by virtue of the Constitution and laws of Alabama, signed by the Governor and countersigned by the Secretary of State, and sealed with the great seal of the State, is for an indefinite and unlimited period, according to the

judgment in said proceedings in the Circuit Court aforesaid, and the time of such imprisonment is made to depend upon the payment of a heavy fine, imposed by said judge, in favor of the United States, or the payment of a certain judgment theretofore rendered in said court in favor of certain citizens or subjects of Spain, and the costs of three suits, in all, amounting to $3,152\frac{00}{100}$ which is also the aggregate sum of the fines imposed upon said persons by said judgment.

5. Petitioner is advised and believes and so states that neither of said persons are in any way liable in law, or in good conscience, for the judgment in favor of Dix & Co., or the costs of said suits mentioned in the proceedings of the Circuit Court of the United States, and that the imprisonment they are suffering is, by and according to the judgment of said court, inflicted upon them in order to compel them to pay the same.

6. And petitioner alleges that said judgment of fine and imprisonment is not within the lawful jurisdiction and power of said Circuit Court to render, for that it has no other foundation than an order of said Circuit Court, made on the 17th day of December, 1875, as shown by said record, which order was for a preemptory *mandamus* to said Peter M. Rowland, as Judge of Probate of Chambers County, and presiding officer of the Court of County Commissioners of said county, and to D. C. Shultze and R. C. Germany, as members of said court, and to two other members of said court, who have since died, and by the terms of said order, as well as by the laws of Alabama, the *mande* was directed to a court of record, which had the right to exercise a certain discretion in respect to the matters, said court was commanded and enjoined to do. And for that, the said mandatory order, and the mandate issued in pursuance thereof, required said Court of County Commissioners of Chambers County to levy and assess and collect a tax upon the property of said county, which was an unlawful order to said court, or the members thereof, and required them to assess and collect a tax, whereas, under the laws of Alabama, said Court of County Commissioners had no power or authority to assess or collect any tax whatever.

And for that, said mandate of the Circuit Court of the United States required said Court of County Commissioners of Chambers

County, Alabama, to levy, assess and collect a tax upon the property of said county by the first day of May, 1876, said order having been made on the 17th of December, 1875; whereas, by the laws of Alabama, said Court of County Commissioners could not levy such tax except at a court to be held on the second Monday of August, 1876; and the Tax Assessor of the county could not begin to assess such tax before the 1st day of March, 1876; and the Tax Collector of said county could not begin to collect such tax before the 1st day of September, 1876.

And for that, said mandatory order and the mandate issued in pursuance thereof, required a tax to be levied, assessed and collected from the property of Chambers County for the payment of the costs of the suit of Dix & Co. *vs.* Chambers County, mentioned in said record, whereas said costs were not such a debt as could warrant a special levy of taxes by said Court of County Commissioners under the provisions of the act of the General Assembly approved December 31, 1868; to which reference is made in said mandatory order.

And for that, said final judgment of said Circuit Court, under which said persons are imprisoned, is in legal effect an imprisonment of citizens of Alabama, within said State, for a debt not due and owing by them, but by the county of Chambers, contrary to the laws and Constitution of said State.

And for that, the said fine and imprisonment are excessive.

And for that, the record shows by the returns by the Court of County Commissioners to the preremptory writ of *mandamus*, and by the returns of three surviving members thereof to the rule for an attachment, that neither the court nor the members thereof had been guilty of any intentional disobedience of the orders of the Circuit Court of the United States, and that they had in fact done all they were required or permitted by the law to do, in order to render full and exact obedience to said *mandamus*.

7. Petitioner states that the imprisonment of said citizens does not, under the laws of Alabama, vacate their offices; so that there is no constitutional or lawful power in the Governor or in any other officer or tribunal of the State, to appoint other persons to discharge the duties of their respective offices; and that said officers are indispensable to the execution of the laws of Alabama, in Chambers County, and that their imprisonmeut is a serious danger

to the most important interests of the people, and is an obstruction to the exercise of the just and clear powers of State Government in the county of Chambers.

The State of Alabama therefore petitions the Honorable the Supreme Court of the Uniten States to cause to be issued a writ of *habeas corpus* directed in accordance with the practice of the Court, or to the marshal of the middle and southern districts of Alabama, to whose charge and custody said Peter M. Rowland and D. C. Shultze and R. C. Germany are committed for imprisonment in the county jail of Montgomery County, Alabama, by the said order of the said Circuit Court; and the writ of *certiorari* to said Circuit Court, if the same be necessary; so that the bodies of said prisoners may be brought before the Honorable the Supreme Court, together with the cause of their detention, that they may do and receive whatever the Supreme Court of the United States may order in the premises. And that the Court will annul and vacate the order of said Circuit Court, under which said persons are imprisoned. And that in the mean time said persons be admitted to the privilege of bail until the court shall otherwise direct, conditioned that they shall appear, when required, to abide by and perform the order and judgment of the Supreme Court of the United States.

RUFUS W. COBB,
Governor of Alabama.
HENRY C. TOMPKINS,
Atty.-Gen. of Alabama.
JOHN T. MORGAN AND
JAS. L. PUGH,
Of Counsel for the Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

Comes Thomas Williams, a citizen of Alabama, and being duly sworn states, on oath, that the matters stated in the foregoing petition of the State of Alabama, are true as therein stated.

THOS. WILLIAMS.

Subscribed and sworn to before me this 14th day of December, 1881.

[SEAL.]

CHAS. B. BEALL,
Notary Public.

IN THE

Supreme Court of the United States.

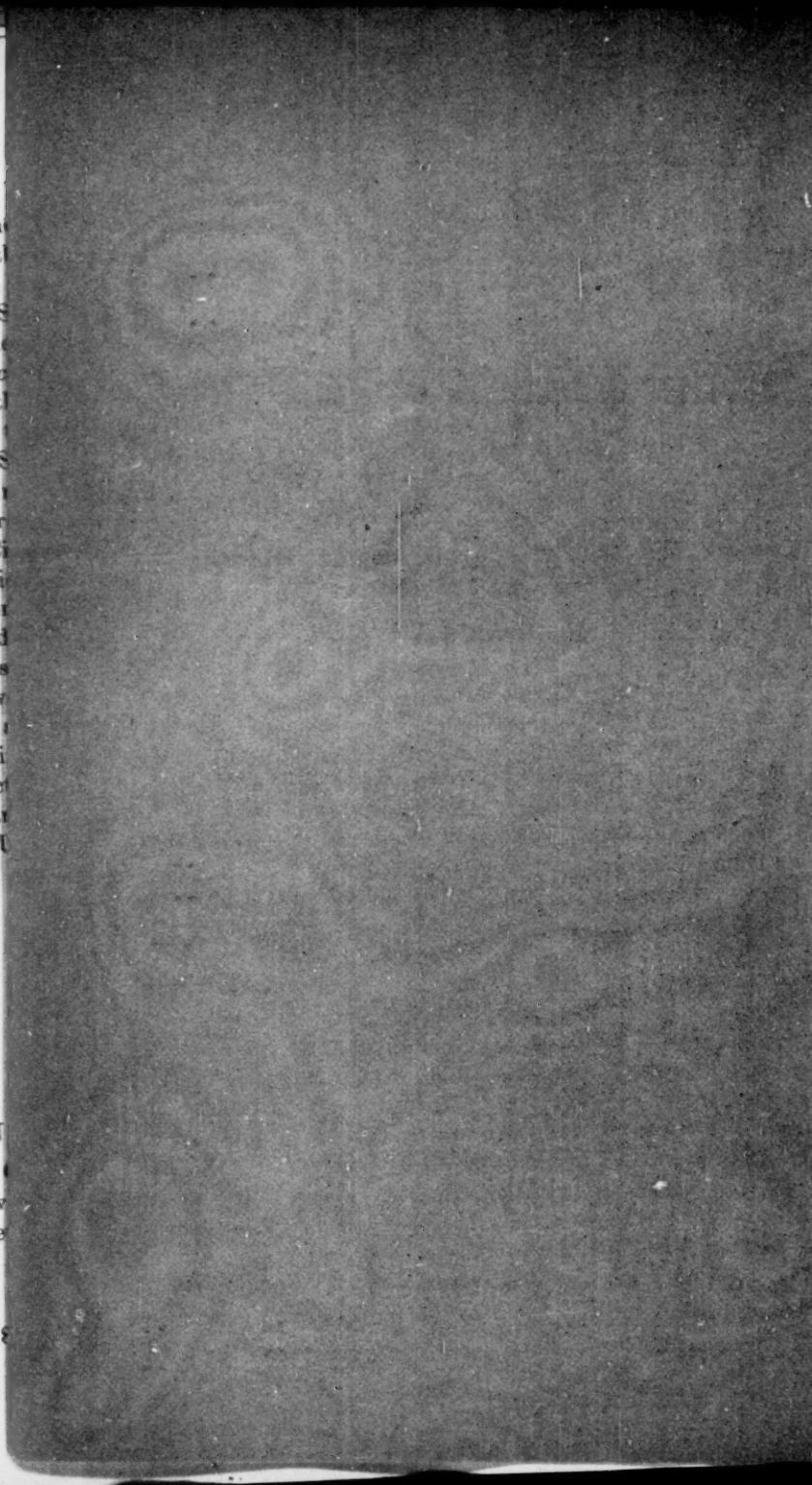
October Term, 1881.

Ex-parte The State of Alabama, and Ex-parte P. M. Rowland, R. C. Germany, and D. C. Schultze.

BRIEF FOR PETITIONERS.

JOHN T. MORGAN.
JAMES L. PUGH.
THOMAS H. WATTS.

J. L. Pearson, Printer, 9th and D sts., Washington.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1881.

Ex-parte The State of Alabama, and Ex-parte Rowland, Germany, and Schultze.

The material facts of this case are as follows:

On the 25th day of May, 1875, Dix & Company, a firm of Spanish citizens, recovered a judgment in the Circuit Court of the U. S. for the Middle District of Alabama, for $2,040.58, and $51 costs of suit, against the county of Chambers, Alabama. The suit was upon interest coupons cut from bonds issued in pursuance of an act of the legislature of Alabama of December 31st, 1868, which will be hereinafter set forth, as far as need be.

After execution, issued on the judgment, was returned "no property found," the plaintiffs, Dix & Co., filed in the said circuit court a petition praying for an alternative mandamus to "Hon. P. M. Rowland, judge of probate and *ex officio* the principal judge of said court of county commissioners, and R. C. Germany, J. H. Forman, W. J. Grady, and D. C. Schultze," members of the said court, and that they be required to appear on the 30th of November, 1875, and show cause, if any they have, why they refuse "*to levy and assess*" a tax under the provisions of the act of December 31st, 1868, for the payment of said judgment. On the 15th Nov., 1875, His Honor W. B. Woods, circuit judge, made the following order in the circuit court:

"In the Circuit Court of the United States for the Middle District of Ala.—November term, 1875.

"DIX & Co.
vs.
THE COURT OF COUNTY COMMISSIONERS OF Chambers County, Alabama, composed of P. M. Rowland, Judge of Probate and ex officio Judge of said Court of County Commissioners, and J. N. Forman, R. C. Germany, W. J. Grady, and D. C. Schultze.

"And now come the plaintiffs, Dix & Company, composed of Charles Dix, George Crawford, and Ferdinand Hincely, who are all aliens, and citizens or subjects of Spain, residing at Havana, in the Island of Cuba, and present and file their petition for a mandamus against the said court of county commissioners and their successors in office, and the court being fully advised in and of the premises, it is ordered that an alternative writ of mandamus issue to the said court of county commissioners of the county of Chambers, returnable to this court on the 23rd day of November, inst., commanding said court of county commissioners and their successors in office *to levy and assess, in accordance with the provisions of an act of the general assembly of the State of Alabama, entitled 'An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the state as they may consider most conducive to their respective interests,'* approved December 31st, 1868, *such a tax* upon the real and personal property of said county, not to exceed one per cent. per annum upon the real and personal property in said county, *as yearly assessed and returned to the proper officers of said county, as will be sufficient to satisfy said judgment in said petition mentioned, together with the interest thereon and the costs of suit,* or that said court of county commissioners or their successors in office show cause before this court, on the 30th day of November, 1875, at 10 o'clock A. M. of that day, or as soon thereafter as said court will hear the same, why they have not done so.

"Nov. 15, 1875. "W. B. WOODS, *Judge.*

"Filed this 15th day of November, A. D. 1875, in open court. "J. W. DIMMICK, *Clerk.*"

This order is the actual and necessary basis of every subsequent proceeding in the case, which resulted in the imprisonment of the members of said court of county commissioners for contempt.

The alternative writ of mandamus issued on the order of the circuit court, and in strict pursuance of its terms, on the 19th day of November, 1875.

It was served on Forman and Germany on the 30th of November; on Grady and Schultze on the 1st Dec., and on Rowland on the 2d Dec., 1875.

On the 9th of Dec., the parties named in the alternative writ not having appeared or made any defence, the circuit court made the following order in said cause:

"In the Circuit Court of the United States for the Middle District of Alabama.

"DIX & COMPANY
vs.
THE COURT OF COUNTY COMMISSIONERS of Chambers County, Alabama, composed of P. M. Rowland, Judge of Probate and ex officio Judge of the Court of County Commissioners, and J. N. Forman, R. C. Germany. W. J. Grady, and D. C. Schultze.

"This cause came on to be heard at a former day of this term, to wit, on the 9th day of December, 1875, and came the plaintiff, Dix & Company, composed of Charles Dix, George Crawford, and Ferdinand Hincely, who are all aliens and citizens or subjects of Spain, residing at Havana, in the Island of Cuba, and by their attorneys, Rice, Jones & Wiley, move the court for a peremptory writ of mandamus against *said court of county commissioners* of Chambers County, and against *each and every member of said court* of county commissioners, and their successors in office, and the court being fully advised of and in the premises from the papers on file in the office of the clerk of this court, which are here referred to and made a part of this judgment entry: it is now, therefore, considered and ordered by this court that a peremptory writ of man-

damus issue forthwith and without delay to and against the court of county commissioners, and every member of said court, *and to their successors in office;* commanding them to to levy, assess, and *cause to be collected*, in accordance with the provisions of said act of the general assembly of the State of Alabama, such a tax upon the real and personal property in the said county of Chambers as will be sufficient to satisfy said judgment with interest and costs, and that they continue to levy, assess, and cause the collection of said tax, as aforesaid, from time to time, until said judgment is entirely satisfied, with interest and costs of suit, and that said court of county commissioners shall make known to this court at the next term thereof, to wit, on the first day of May, A. D. 1876, how they have executed this writ."

This order enlarged the mandate of the alternative writ by adding the words "*and cause to be collected*," after the words "*levy and assess*," contained in the former order of the court directing the issue of the alternative writ.

On the 17th of Dec., 1875, a peremptory writ of mandamus was issued under said order, in the words following:

"Now, therefore, you, the said P. M. Rowland, judge as aforesaid, and R. C. Germany, J. N. Forman, W. J. Grady, and D. C. Schultze, members of and composing the court of county commissioners of said county, are hereby commanded forthwith and without delay *to levy and assess, and cause the collection of*, in accordance with the provisions of said act of the general assembly of said State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy said judgment, with interest and costs, and that you continue to levy and assess said tax and cause the same to be collected, as aforesaid, from time to time, until said judgment is wholly satisfied, with interest and costs of suit, and how you shall have executed this writ, make known to us, to the judge of this court, at the next term of said court, on the first day of said term, on, to wit, on the first day in May, A. D. 1876."

This writ was served on each member of the commissioners' court on the 14th of Feb., 1876.

On the 3d of May, 1876, the court of county commissioners made return to said writ, as follows:

"To the Honorable the Circuit Court of the United States for the Middle District of Alabama.

"The commissioners' court of Chambers County, Alabama, in pursuance of a peremptory mandamus issued by said circuit court, on the 17th day of December, 1875, have levied the tax as therein required, as will be seen from the annexed order which has been placed upon the records of said court. All of which is respectfully submitted.

"P. M. ROWLAND,
Judge of Probate, &c.

"At a regular adjourned term of the commissioners' court, begun and held for Chambers County, Ala., on Monday, the 24th day of April, 1876. Present: the Honorable Peter M. Rowland, judge of probate court, D. C. Schultze, J. H. Forman, W. J. Grady, and R. C. Germany, when the following proceedings were had, to wit:

"On the 17th day of December, 1875, a peremptory mandamus was issued out of the Circuit Court of the United States at Montgomery, Ala., and executed on the commissioners of said county on the 14th of Feby., 1876, at the suit of Dix & Co., commanding the commissioners' court of Chambers County to levy a tax for the purpose of paying a judgment in said court in favor of said Dix & Co. against said county, rendered at the May term, 1875, for the sum of two thousand and forty and $\frac{58}{100}$ dollars, and fifty-one dollars costs, and that they report their action in the premises to the May term, 1876, of said court. Now, as required by said order, it is ordered that a tax of one-fourth of one per cent. on the value of the real and personal property of Chambers County be levied for the purposes above set forth, and that the tax-collector proceed to collect said tax as required by law.

"Filed this the 3d day of May, A. D. 1876.

"J W. DIMMICK, *Clerk.*"

No exception was taken to said return and no further proceedings were had in the case against the court of county commissioners until May 3d, 1881, when the following order was made:

"DIX & COMPANY
vs.
THE COURT OF COUNTY COMMISSIONERS of Chambers Co., Ala. } May 23, 1881.

"This day came the plaintiffs by their attorneys, and duly apply to and move the court for the issuance of a rule to the said court of county commissioners of Chambers County, as well as to the members thereof, that is to say, to P. M. Rowland, judge of probate and ex officio judge of the said court of county commissioners, and to J. H. Forman, R. C. Germany, W. J. Grady, and D. C. Schultze, who were members of and together constituted said court of county commissioners of said county of Chambers at the time of the due and proper service upon them and each of them, on, to wit, the 14th day of February, 1876, of a peremptory writ of mandamus issued in said cause, as well as to each of the aforenamed members of said court of county commissioners, to appear instanter, as soon as duly served, and then and there show cause, if any they have, why an attachment should not issue against them and each of them for *violating and disobeying the said peremptory writ of mandamus* issued to and against them in said cause and duly served on them as aforesaid, commanding them forthwith, and without delay, to levy and assess, and cause the collection of, in accordance with the provisions of the act of the general assembly of Alabama, therein particularly alluded to, such a tax upon the real and personal property in said county of Chambers as would be sufficient to satisfy a judgment, obtained by plaintiffs in said cause, on the 25th day of May, 1875, for $2,040.58, besides interest and costs, and that they should continue to levy and assess said tax, and cause the same to be collected as aforesaid from time to time until said judgment should be wholly satisfied, with interest and costs of suit, and sufficient cause being shown to the court for the issuance of the rule moved for as aforesaid, it is therefore and thereupon ordered that the rule moved for be issued instanter and be served and returned without delay.

"JOHN BRUCE, *Judge*."

A rule to show cause was issued under said order, and at the June term of the court, 1881, the parties served made their return, which is printed in the record.

Two of the commissioners had died—Grady and Forman—and John H. Seryer and John H. Higgins had been elected as their successors before this attachment for contempt was asked for.

The return discloses the purpose and desire of the respondents to obey the mandate of the court, and that the commissioners' court had levied the tax as required in its orders and mandate issued to them, and that it was not collected because the tax-collectors had refused or failed to collect the same, and were not qualified to collect the same, for the want of proper bonds as collectors of special taxes.

The returns were not disputed as to any matters of fact stated in them, but the court in the following order, rendered July 16th, 1881, held them to be wholly insufficient:

"Dix & Co.
vs.
P. M. Rowland, Judge of Probate, &c., D. C. Schultze, and R. C. Germany, as members of the Court of County Commissioners of Chambers County, Alabama.

"Rule to show cause why the respondents above named should not be punished for contempt of court, for failing to obey *the peremptory writ of mandamus heretofore awarded* against and duly served upon each of them. And thereupon respondents, appearing by Wm. H. Smith, esq., their attorney, moved to quash the rule to show cause, which motion was overruled. The respondents then filed their respective answers to said rule, which were considered and held in all respects insufficient, and to furnish no excuse or exoneration for their failure to obey said writ; said respondents, P. M. Rowland, D. C. Schultze, and R. C. Germany, are there adjudged to be guilty of contempt of this court in relation to said writ, but sentence is hereby suspended and this cause continued until the next term of the court, *in order* that the said defendants may have an opportunity *by that time to pay said judgments with interest and costs;* and said respondents are each required to be and appear before this court upon the first day of the next termof this court, to wit, upon Monday, the 7th day of November, A.

D. 1881, at 12 o'clock M., to certify obedience to this order, and to receive such sentence as the court may deem meet to pronounce in the premises.

"July 16th, 1881. "JOHN BRUCE, *Judge.*

"Filed July 16th, 1881.

"J. W. DIMMICK, *Clerk.*"

This order changes the entire nature and character of the proceeding against the court of county commissioners to compel it to levy, assess, or collect a tax in obedience to the orders of the circuit court, into a proceeding to coerce the surviving members of that court, (as constituted in February, 1876,) as individuals, "to pay said judgment" of Dix & Co.

The mandamus proceeding was abandoned, and neither in that judgment nor afterwards is it mentioned, except as matter of inducement, or as a predicate, for an attempt to compel the respondents to pay said judgment, with interest and costs. Neither in the order above copied nor in the next and final order is any opportunity given to the respondents to do and perform any duty the court had imposed upon them, or in any way to exonerate themselves from fine or imprisonment, except to pay the judgment of Dix & Co., with costs and interest.

From the time the foregoing order was made, the collection of a judgment by process of attachment against the persons of the respondents, in the nature of a *capias ad satisfaciendum*, was the sole purpose and end of the proceeding.

This clearly appears from the final order of the circuit court in the cause, made on the 23d of Nov., which is as follows:

"DIX & COMPANY *vs.* P. M. ROWLAND, JUDGE OF PROBATE OF Chambers County, D. C. Schultze, and R. C. Germany, members of the court of county commissioners of said county of Chambers, in the State of Alabama.	Nov. 21st, 1881. Proceeding by attachment for contempt.

"In this proceeding by attachment for contempt, all the parties appeared in this court and were further heard by this court touching the matter of contempt involved in this proceeding; and it appearing to the court that, at the last term of this court, to wit, on July 16, 1881, the respondents, the said Rowland, Schultze, and Germany, were fully heard as to the said matters of contempt in disobeying the said peremptory writ of mandamus duly issued out of this court, theretofore to them, and duly served on them, and that upon said hearing the said respondents were duly and properly adjudged and found by this court to be guilty of contempt of this court in relation to said peremptory writ of mandamus mentioned in this proceeding for contempt, and in disobeying said last-named writ, but that said respondents were required to appear in this court on the first day of this term, to receive such sentence as this court may deem meet to pronounce in the premises. And it is now made further to appear to this court, that said respondents have not obeyed said peremptory writ of mandamus, nor certified any such obedience, but still continue to disobey said writ of peremptory mandamus, and that said respondents are guilty of said contempt in disobeying said peremptory writ of mandamus, and that the judgment of said Dix & Company mentioned in that writ, and in respect to which that writ was issued, remains wholly unpaid and unsatisfied and of full force, and that the amount due upon said last-mentioned judgment, including the principal and lawful interest thereon, and the costs up to this day, is ($3,152) thirty-one hundred and fifty-two dollars. It is, therefore, considered, ordered, and adjudged by this court, that the said respondents, the said P. M. Rowland, D. C. Schultze, and R. C. Germany, are guilty of said contempt in disobeying as well as in continuing to disobey the said peremptory writ of mandamus, and the order and command of this court therein, and that for said contempt each of the respondents is here and now sentenced by this court to pay to the United States, as a fine for his said contempt, the sum of one thousand and eighty-eight dollars, and to be and to stand imprisoned in the common jail of Montgomery County, in the State of Alabama, until the said fine hereby imposed upon him, and all the costs of this proceeding for contempt, are paid; that in addition to said fines hereby imposed upon each of said respondents respectively, the sentence of this court also is,

that said respondents pay all the costs of this proceeding *and stand imprisoned as aforesaid until the whole of said costs shall be paid.* But the court further orders and adjudges, that if the said judgment of said Dix & Co., under and in respect to which said peremptory writ of mandamus issued, and also *all the costs of this proceeding and of the proceedings in which said peremptory mandamus issued*, shall hereafter be paid and satisfied in full, and such satisfaction be entered on the execution docket or minutes of this court *before the said fines are paid*, then and in that event all further proceedings under said sentence of this court *shall thereupon cease*, and the said respondents shall *thence be discharged from imprisonment* under said sentence.

"JOHN BRUCE, *Judge.*

"Filed Nov. 23d, 1881.

"J. W. DIMMICK, *Clerk.*"

In this extraordinary order the power to fine or imprison for contempt of the order of the court, which is a power of criminal jurisdiction, is employed to compel the judge of probate and two members of a court of record (Code of Ala., § 739) to pay a debt due from Chambers County, and the costs of three suits, under the penalty of imprisonment for an unlimited time. It is duress of imprisonment, imposed for the purpose of extorting the payment of the debt of Chambers County by three men who are not liable for it in morals or in law.

The order violates the law by using the criminal jurisdiction of the circuit court of the United States, under the guise and pretext of protecting the dignity and authority of the court and compelling obedience to its orders, when the undeniable purpose and meaning of that order is to take the bodies of the judge of probate and two members of the county court of commissioners, *in execution*, to satisfy a debt of the county, and to hold them imprisoned in the county jail of another county, or wherever the court may choose to order them to be confined, until they pay that debt.

The parts of the act of the general assembly of Alabama, approved Dec. 31, 1868, which confer any power or impose

any duty upon the courts of county commissioners in reference to the levy, assessment, or collection of taxes to pay interest on bonds issued by counties in pursuance thereof, are as follows:

SECTION 7. "*Be it further enacted*, That the court of county commissioners of said counties in which the electors shall have voted in favor of said subscription, are hereby authorized and required to *levy and assess in the same manner as is now required by law for the collection of state and county taxes*, such tax as may be necessary to meet the interest falling due semi-annually on said bonds, and other such reasonable amount, to be determined by said court, as will pay the expenses of assessing and collecting said tax and for issuing said bonds; *Provided*, That in no case shall such tax exceed one per cent. per annum upon the value of the real and personal property in said county, *as yearly assessed and returned to the proper officers*.

"SECTION 8. *Be it further enacted*, That the courts of county commissioners in the various counties in which such subscriptions shall have been made, as hereinbefore provided, are hereby authorized and required to require the tax-assessors and tax-collectors to assess and collect said tax. Then said courts of county commissioners shall be, and they are hereby, invested with all the powers, privileges, and rights, and bound by the same duty of proceeding against said tax-collectors and tax-assessors, and their sureties, as are vested in, granted to, and imposed upon the auditor of public accounts by law, for the amount of said taxes not assessed, collected, and paid over, or misapplied.

"SECTION 9. *Be it further enacted*, That the tax-assessors and collectors in the various counties which shall have voted for subscription, as hereinbefore provided, are hereby invested and empowered with all the rights and remedies for collecting said tax as are now provided by law for the collection of state and county taxes, and be bound by the same duties, and that the same pains and penalties as are now prescribed by law shall attach to all persons for failing to render a tax-list or for rendering a false list.

"SECTION 12. *Be it further enacted*, That the courts of county commissioners of the various counties are hereby vested with power to do any and all acts to carry out all

that said respondents pay all the costs of this proceeding *and stand imprisoned as aforesaid until the whole of said costs shall be paid.* But the court further orders and adjudges, that if the said judgment of said Dix & Co., under and in respect to which said peremptory writ of mandamus issued, and also *all the costs of this proceeding and of the proceedings in which said peremptory mandamus issued*, shall hereafter be paid and satisfied in full, and such satisfaction be entered on the execution docket or minutes of this court *before the said fines are paid*, then and in that event all further proceedings under said sentence of this court *shall thereupon cease*, and the said respondents shall *thence be discharged from imprisonment* under said sentence.

"JOHN BRUCE, *Judge.*

"Filed Nov. 23d, 1881.

"J. W. DIMMICK, *Clerk.*"

In this extraordinary order the power to fine or imprison for contempt of the order of the court, which is a power of criminal jurisdiction, is employed to compel the judge of probate and two members of a court of record (Code of Ala., § 739) to pay a debt due from Chambers County, and the costs of three suits, under the penalty of imprisonment for an unlimited time. It is duress of imprisonment, imposed for the purpose of extorting the payment of the debt of Chambers County by three men who are not liable for it in morals or in law.

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"SECTION 8. *Be it further enacted*, That the courts of county commissioners in the various counties in which such subscriptions shall have been made, as hereinbefore provided, are hereby authorized and required to require the tax-assessors and tax-collectors to assess and collect said tax. Then said courts of county commissioners shall be, and they are hereby, invested with all the powers, privileges, and rights, and bound by the same duty of proceeding against said tax-collectors and tax-assessors, and their sureties, as are vested in, granted to, and imposed upon the auditor of public accounts by law, for the amount of said taxes not assessed, collected, and paid over, or misapplied.

"SECTION 9. *Be it further enacted*, That the tax-assessors and collectors in the various counties which shall have voted for subscription, as hereinbefore provided, are hereby invested and empowered with all the rights and remedies for collecting said tax as are now provided by law for the collection of state and county taxes, and be bound by the same duties, and that the same pains and penalties as are now prescribed by law shall attach to all persons for failing to render a tax-list or for rendering a false list.

"SECTION 12. *Be it further enacted*, That the courts of county commissioners of the various counties are hereby vested with power to do any and all acts to carry out all

the provisions of this act, which are not inconsistent with the act itself, and the laws of the state and the United States."

The "powers, privileges, and rights," and the "duty of proceeding against said tax-assessors and collectors and their sureties," which in the 8th section are "given to and imposed upon" the courts of county commissioners, are the same "as are vested in, granted to, and imposed upon the auditor of public accounts by law for the amount of taxes not assessed, collected, and paid over, or misapplied."

The only proceedings which the comptroller of public accounts (who is styled "auditor" in the 8th section) could resort to for any official delinquency of a tax-collector, are found in sections 3,059 to 3,061, on p. 595, and in section 566, on pp. 199 and 200, of the Revised Statutes of Alabama.—(Walker's Edition, 1867.) Nothing in these statutes relates to the failure or refusal of the tax-collector to collect the taxes, general or special. Such failure is made a misdemeanor by section 568, punishable by indictment, and on conviction, a fine. In 1868, and since, all *assessments* of taxes, whether general or special, are required by the general laws of Alabama to be made by county assessors.—(See Rev. Stat. of 1867, § 434.) The system is elaborate and well digested, and every duty required is guaranteed by bond, with sureties, and by penal and criminal laws. The state and the counties use this assessment. The counties, through their courts of county commissioners, make a levy of a percentage upon such assessments for county purposes. The general rules for assessment and collection, which are adopted in the act of December 31, 1868, are found in § 452 of the Revised Statutes. They fix the tax year to end on December 31st. The assessment must not begin until the 1st day of March. It must be finished on the 1st day of August. Collections must not begin before the 1st of Sept. in each tax year.

Under the statute, §§ 534, 535, 536, the court of county commissioners must revise the assessment at a court to be

held on the second Monday of August, and "must determine and order the rate of percentum to be collected for county purposes upon the amount of the state tax as shown by the assessment book."

A tax, general or special, cannot be levied at any other time, except where the power is expressly given by statute.

The Constitution of December 6, 1875, in Art. XI., sec. 5, provides "that to pay debts existing at the ratification of this Constitution, an additional rate of one-fourth of one per cent. may be levied and collected, which shall be exclusively appropriated to the payment of such debts or the interest thereon." This is a proviso to the preceding part of said clause which prohibits a county from the levy of a larger rate of taxation in any one year than one-half of one per centum on the value of the taxable property therein.

In 1868, as now, the laws of Alabama required that official bonds be made payable to the state, (Rev. Stat., § 157,) but gave a remedy on the bond, by suit in the name of the state "for the use of every person who is injured, as well by any wrongful act committed under color of his office, as by his failure to perform, or the improper or neglectful performance of those duties imposed by law."

The foregoing is the entire case upon the laws of Alabama, and the facts set forth in the record.

Points of Argument.

On behalf of the petitioners as individuals, it is insisted—

I. That the peremptory writ of mandamus was in its essence a judicial writ directed *to the court of county commissioners* of Chambers County, *a court of record* existing and organized under the general laws of Alabama, and consisting of four elected members and one ex officio member—the judge of probate of that county—who is an officer named in the Constitution of Alabama.

Const. of Ala., Art. VI., § 12, and Rev. Stats., § 739.

The erroneous hint in the writ of a proceeding *in personam* against the petitioners is of no consequence in the proceedings (unless it may be to vitiate them), since the duty which the writ enjoins could only be performed by the petitioners as a court. Could such a writ, in such a case, lawfully eventuate in a judgment of fine and imprisonment of the members, or a part of them, who comprise this state court, by the order of a federal court?

See United States vs. Hudson, 7 Cranch, 32.

If this can be the result it must be reached only through the power given in the last clause of the act of Congress of March 2, 1831, to punish for contempt of the court by "the disobedience or resistance by any officer of the said courts, *party*, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

Ex-parte Robinson, 19 Wall., p. 510.

The court of county commissioners of Chambers County was a party to the proceeding of mandamus, and as such court was amenable to the *lawful orders*, &c., of the U. S. circuit court. But did it, or could it, commit a crime, even in an act of disobedience to such lawful orders, &c., so as to warrant the imprisonment of the probate judge, who was ex officio a member of the court, and had no vote in its proceedings, except in case of a tie, under § 749, Rev. Stats. of Ala., or when he holds a court under § 742?

If a majority of a court so constituted disobeys "the order," &c., will that justify the imprisonment of the minority whose presence makes a quorum and so gives the power to the recalcitrants to make their disobedience in fact obstructive to "the orders," &c.?

In this case there was no personal or judicial contempt of the orders of court, and no such intimation is found in the proceedings. This the record conclusively establishes.

All the judges of the state court concurred in all that was done in levying the tax, but two of them are dead and others have been elected to their places, and in con-

sequence of that fact, in part, the effort now is to change the proceedings so as to ignore the court, and to prosecute the survivors in a personal and individual action.

It may be difficult to establish the proposition that a court of superior jurisdiction, having the power of judicial control over an inferior court, may not imprison all or a part of its members until they yield obedience to the higher authority; or that it may not imprison the majority of such a court until they consent to the judgment of the minority. But the rule of law which forbids criminal punishment for opinions honestly held by a judge, when the question for decision *rests in any degree* upon his discretion, is a great and salutary safeguard against the exercise of powers so dangerous and unseemly.

It is a different matter, however, when the court which assumes the superiority belongs to a power and jurisdiction separate from that of the court to be subjected to control, and is entirely independent of the sovereignty whose commission the latter holds.

Such assumptions are calculated to bring the sovereigns into conflict, and are, therefore, not to be lightly indulged. In such case it should appear, at least from some clear declaration of law, not to be misunderstood, and the authority to make which is unquestionable, that the power exists in the federal judge to imprison the state judges. There has been no such declaration. The 14th section of the judiciary act gives to the federal courts power to issue writs of mandamus, but the power to extend such writs to state courts can only exist where the duty to be performed is enjoined by state laws, and is purely ministerial, or where the laws of the United States give to the federal courts appellate and revisory power over the judgments of the state courts.

The *supposed* power in this case rests solely upon the traditions of the common law of England in reference to the powers of the English courts, which are *supposed* to supply this supremacy of the federal over the state courts.

If both courts belonged to the same judicial system, and were fed from the same grants of judicial power, and graded in rank and power by the same laws, the question would be less difficult. But this in not the fact. The states whose courts are supposed to be inferior, are the fountains of authority for every step to be taken against a state court or officer, by a federal court, in every mandamus proceeding to compel the levy of tax on the people of such states to satisfy a judgment of a federal court.

These courts claiming only the right to *compel obedience to state laws* by mandamus, and being required by federal laws to conform their proceedings, in such cases, to state laws, must also pay some deference to state laws when they come to inflict upon state courts the imprisonment of their judges as a penalty for judicial disobedience.

Rees vs. Watertown, 19 *Wall.*, 107.

If it is conceded that a superior court in Alabama has the power to imprison the judges of an inferior court for disobedience of its orders, it does not follow that the existence of such a power in the state superior courts increases the authority or jurisdiction of the federal courts, so as to confer on them like powers, or to provide them with machinery for its due exercise. Whatever Alabama may have provided in such matters was to perfect her own system of government, and not to confer powers on the courts of a separate and independent jurisdiction.

But Alabama has no such laws, so that for the punishment of contempt in such cases by the imprisonment of judges, the powers of the federal courts must come from the statutes of the United States or from the common law of England.

The common law is, in this respect, inapplicable to our institutions. The powers of the courts of superior jurisdiction in England were exerted in, and as part of, a system which obtained in the same realm, and were supported in every step and degree of their exercise by the same sovereign power. In this country it is different.

We have here two sovereign sources of judicial power, and while both are controlled and limited in their respective spheres by the Constitution of the United States, they are, except when controlled by the supreme law, as independent in their action as they are in their origin.

Martin vs. Hunter, 1 *Wheaton*, 304.
Amy vs. The Supervisors, 11 *Wall.*, 136.
Riggs vs. Johnson, 6 *Wall.*, 166.

The only act of Congress bearing on the subject of this alleged contempt, is that of March 2, 1831, which the Supreme Court, in *Ex-parte* Robinson, 19 Wall., declares to be a restrictive act limiting the power of the circuit courts to punish for contempt. So there is nothing left from which to derive the power of the federal courts to imprison state judges for contempt of their judicial writs of mandamus except the restrictive words of that statute. "The enactment is a limitation upon the manner in which the power shall be exercised, and must be held to be a negative of all other modes of punishment." With equal or greater force it may urged as to this restrictive law, that it confines the circuit and district courts to *parties* and *persons* and *officers* and the like, who disobey, &c., and cannot be extended by construction to include state courts, or governors, or judges, within the power of imprisonment for disobedience of orders.

If the statutes and constitution of Alabama are examined, it will be seen that in respect of the variety and importance of the lawful duties of a judge of probate, he is the most indispensable officer in the state, and perhaps second to none, in his importance as a governing power, in the state economy.

In addition to his jurisdiction as to all matters relating to guardians of all descriptions,—the probate of wills, as to executors and administrators, and all that pertains to the disposal of the estates confided to them,—he has, in a large measure, the preparation of juries for all the courts, the

appointment of election officers and the examination of their returns, the trial of contested elections, the supervision of tax assessments and collections, the care of the poor, the conduct of the public schools, the laying out of roads, the establishment of ferries and bridges and keeping them in repair, the county buildings and the county finances, besides very many duties imposed upon him by special laws.

A probate judge imprisoned for an indefinite time in the common jail of another county, is not out of office, and cannot be removed for that cause.

The governor cannot remove him, nor has any law made it possible to have a judge *ad interim*. In such case his only chance to do justice to his office, or the people who are so deeply concerned in it, is to resign the honorable and valuable trust, and leave it to the governor to appoint his successor. This is a painful and degrading alternative to a man who has tried to do his duty.

A more reasonable solution of this question would be to adhere to the *civil* character of the proceeding by mandamus, where a state court is moved against, and to leave the plaintiffs to their civil action, as was done in Amy vs. The Supervisors, 11 Wall., 138.

In Alabama the judge of probate gives bond, with sureties, for the faithful discharge of all his duties, and, as we have seen, any person injured has the right, under a general law, to bring suit on that bond.

"Contempt of court is a specific criminal offence. The imposition of a fine was a judgment in a criminal case."

New Orleans vs. Steamship Co, 20 Wall., p. 392.

It is not clearly discernible under what rule of English common law, or by what power inherent in the nature of the circuit or district courts of the United States, they can exercise a criminal jurisdiction over a state court, or that the statute of March, 1831, gave such power to said courts. It is against the theory of our dual system of government

that such a power should exist, and if it is sustained it must lead to perplexing difficulties.

See Holmes vs. Jemison, 14 Peters, 585 and '6.

It cannot be successfully denied that the extension of such a principle would involve the suspension of the state governments at the suit even of a citizen of a foreign government.

Without its probate judges, and without its county commissioners, the State of Alabama would be paralyzed.

II. If, however, the jurisdiction of the circuit court of the United States (sitting in Alabama and executing its laws) to impose a fine and imprisonment upon a court of county commissioners, or upon the judge of probate and commissioners of a county, cannot be successfully controverted; and if the proceedings in this case, so far as they relate to the matter of contenpt, are to be regarded as a suit or rule against the petitioners *in personam* and as individuals; yet, on the record it appears that the circuit court of the United States has not only exceeded its jurisdiction in giving judgment of condemnation against the petitioners, and also in the nature and terms of the final order for their imprisonment, but that the mandate of the court in the peremptory order of mandamus was in plain violation of law, and was void.

It also appears that there had been no contempt of the order of the court by the court of county commissioners, but that they had even violated the laws of Alabama in their efforts to render obedience to the order of the circuit court of the United States. It further appears that the final order of the circuit court, while professing to vindicate its authority against a contumacious act or omission of duty by the court of county commissioners, in fact put the members of that court in jail only as a means of compelling them to pay a debt of Chambers County to Dix & Co.

Excess or abuse of jurisdiction in cases of contempt avoids the order inflicting the punishment, and the Supreme Court will relieve those who are imprisoned under such orders on *habeas corpus*.

Hurd on Habeas Corpus, pp. 411 to 415, and note.
Ex-parte Yerger, 8 Wall., 85.
Ex-parte Virginia, 100 U. S., 339.
Ex-parte Seibold, 100 U. S., 371.
Ex-parte Robinson, 19 Wall., 505.
Ex-parte Lange, 18 Wall., 163.
Ex-parte Jackson, 96 U. S., 727.

Was the peremptory writ of mandamus, if valid, a sufficient basis for the attachment proceeding which resulted in the imprisonment of the petitioners? Reference to that writ and the order on which it is based, and to the act of Dec. 31, 1868, and the general laws of Alabama cited and quoted in this argument, will show that to "levy and assess" a tax to pay the debt due to Dix & Co. from the county of Chambers was not a merely ministerial duty, but was one which, *even according to the terms of the writ*, required judgment and discretion, and also the action of *a court of record*.

The writ required a *result* to be obtained, viz., to levy and assess, and cause to be collected, a sufficient tax to raise a sum sufficient to pay the judgment due Dix & Co., with interest and *the costs of the suit of Dix & Co. vs. Chambers County*.

The writ did not state by what means this tax was to be levied and assessed, or when this should be done, or on what property the levy or assessment should be made, or how or by whom it should be collected, but left all this *to the court*, to be provided and determined under its general powers as a court. It did, however, command that court to do an act clearly unlawful, viz., to levy a tax on the people to pay the costs of the suit in which Dix & Co. recovered judgment against Chambers County.

The court of county commissioners proceeded according to its legal discretion, and in harmony with the writ, to obey it as far as possible, and the judges find themselves in jail because Judge Bruce thinks they committed an error, and holds them there, not until they conform their action to his opinion, but until they pay the debt to Dix & Co.

The illegal feature of requiring a levy and assessment of taxes to pay the costs of the suit of Dix & Co. vs. Chambers County continued through every subsequent stage of proceedings, and the petitioners are now in jail, to remain until they pay that cost, *and all the costs that have accrued in the mandamus and attachment proceedings.*

The record shows that the petitioners have been guilty of no contempt, unless it was in the discretionary exercise of a right of judgment as to how and when taxes were to be so assessed and levied.

The law as to issuing a mandamus in such cases is very clearly stated in Life Ins. Co. vs. Adams, 9 Peters, p. 603; Ex-parte Martha Bradstreet, 8 Peters, p. 588; Litchfield vs. Register and Receiver, 9 Wall., 575; Ex-parte Railway Co., 101 U. S., p. 720; Virginia vs. Rives, 100 U. S., —; Ex-parte Bradley, 7 Wall., 364.

III. Certain principles of law, universally recognized where the common law prevails, apply to this proceeding and show its invalidity, as follows:

(1.) The power to issue mandamus can only be based on a showing of clear legal right and where there is no other remedy.

High on Ex. Legal Rem., 3–15, et seq.

"The writ has never been extended so far, nor ever used to control the discretion and judgment of an inferior court of record, acting within the scope of its judicial authority." —(Ex-parte Railway Co., supra.) Nor can it be used to imprison a state officer.

Kentucky vs. Heneson, 24 How., 66.
Lamar vs. Commissioners, 21 Ala. Rep., 772.
Ex-parte Echols, 39 Ala., 692.
Ex-parte Robbins, 29 Ala., 71.
Ex-parte Jones, 1 Ala.
Chisholm vs. McGeehe, 41 Ala., 492.

(2.) When the writ issues to a person or tribunal having the right to exercise any discretion or judgment, it must be general, and command such person or tribunal to act in the matter referred to, but it cannot direct that any special or specific action be taken.

High on Ex. Rem., §§ 532, 539.
Tapping on Mandamus, pp. 370–1.

(3.) When the writ issues to compel the performance of a purely ministerial duty by a person or tribunal, the order for the writ, and the writ also, must set forth the specific duty that is enjoined by law or by the court.

High on Ex. Rem., §§ 532, 539, 561.
Tapping on Mand., top p. 369–70.
Hartsham vs. Elsworth, 60 Maine, 276.

(4.) The command in the order, and in the writ, can never extend beyond the obligation imposed by law.

Chance vs. Temple, 1 Iowa, 179.
U. S. vs. County of Macon, 99 U. S., p. 591.
Burkley vs. Levee Commissioners, 93 U. S., p. 265.
U. S. vs. County of Clark, 95 U. S., p. 778.
High on Ex. Rem., §§ 159, 561.
Tap. on Man., top p. 370.

(5.) The writ must precisely state what is required to be done, and the defendant is not required to look dehors the writ for his authority to act, or for the protection he is to receive from it while obeying its command.

High on Ex. Rem., §§ 539, 532, 537, 538, and 540.
State vs. Judge, 15 Ala., 740.

(6.) The writ cannot create powers in the tribunal or person to whom it is directed, nor compel the performance of an unlawful act.

Cases cited *supra*, and Cook vs. Candee, 52 Ala., 109.
High on Ex. Rem., §§ 32, 34, 36, 37, and 40.
Rice vs. Walker, 44 Iowa, 453.
U. S. vs. Clark, *supra*.
U. S. vs. City of New Orleans, 2 Woods, 235.

(7.) The writ, on its face, must show that it is the duty of the defendant to perform the act sought to be enforced; and must set forth the precise duty enjoined.

People vs Brooks, 57 Ills., 142.

It cannot, when it enjoins a merely ministerial duty, in general terms command the performance of such duty "according to law," or "as required in a certain law." It must state the precise duty under the law that is required to be performed.

Tapping on Man., top p. 372, and cases cited, *supra*.
High on Ex. Rem., §§ 539, 538, and notes.

(8.) If the writ requires more to be done than the law enjoins, it is void. If it commands an unlawful act, it is void (High on Ex. Rem., § 539), and the defect may be taken advantage of at any stage of the proceeding.

High, § 538, and note 3.
Ibid., 549 and 571.
Haukins vs. Moore, 3 Ark., 345.
Tapping on Man., (Law Library Edition,) top p. 372.
People vs. Dutchess, 58 N. Y., 152.

IV. An examination of the record will show that in these proceedings no respect has been shown for any of the rules so well established to govern in the use of this extraordinary writ.

But the want of jurisdiction and the excess of the action of the court beyond its lawful jurisdiction appear in the facts set forth in the record.

1st. That the punishment is ostensibly imposed upon the petitioners *for contempt in not collecting or causing to be collected* the taxes which they in fact "levied" upon the property of the county, as assessed in the "yearly assessment" made by the tax-assessor of the county.

This was an unlawful command, whether addressed to the court of county commissioners or the members of the court. It was impossible of performance by them under the laws of Alabama, and was not made a part of their duties by the act of December 31, 1868.

Under the laws of Alabama the commissioners could do no more than to levy the tax on the property duly assessed.

They had no right to collect the taxes, and any attempt to do so would have involved them in liability as trespassers, and would have made them indictable criminally.

The powers of the auditor of public accounts given to the court of county commissioners in the 8th section of the act of 1868, under which the coupons of Dix & Co. are supposed to have been issued, do not alter the matter, since the auditor had no power to proceed against delinquent tax-collectors for failing to collect taxes. He could not even sue upon their bonds without the order of the governor, and then only by ordinary suit in the circuit courts.

But this mandamus does not require the court of county commissioners or the members thereof to sue the tax collector, or to move against him in any form. It leaves that matter without directions, and the petitioners are imprisoned for not bringing suits that neither the law nor the mandate of the court required them to institute, and which Dix & Co. *alone had the right to bring, under the laws of Alabama.*

2d. The mandate in the writ addressed to the petitioners to "cause the collection of, in accordance with the provisions of said act of the general assembly of said State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy said judgment, with interest and costs, and that you continue to levy and assess, and cause the same to be collected as aforesaid, from time to time, until said judgment is wholly satisfied," is either void for uncertainty, if it commands the performance of a ministerial act, or else it confides to the legal discretion of said court the selection of such means as in their judgment would be lawful and proper to "cause the collection of the taxes." In either case their action would afford no ground for an attachment, and no just ground for a charge of contempt.

3d. The including of costs of the suit of Dix & Co. vs. Chambers County, in a mandate for taxing the people for its payment, is a fatal defect in the proceeding, which vitiates it from the beginning. Such costs are a general debt of the county, to be paid out of the county treasury, and form no part of a bond or coupon debt, for which the county commissioners can levy a special tax under the act of December, 1868.

4th. The mandamus required the court of county commissioners to levy and assess a tax between December, 1875, and May, 1876. The statute requires them to make such levies at the August term of the court. The order requires them to collect the taxes by May, 1876, while the statute forbids the tax-collectors from beginning to collect taxes until September, 1876.

The order requires them to continue to levy, assess, and collect the taxes until the debt is paid, but no rule was ever served on them to show cause why they had not so continued.

They make full return of obedience to the mandate, so far as its terms, or the law, gave them warrant to proceed,

and there is no traverse of their return. It is, therefore, final.

5th. But the judgment by which the petitioners are convicted of a contempt of the orders of court, was rendered in July, 1881, on a rule to show cause issued on the 25th May, 1881, five years after the alleged default. That judgment suspended sentence until the next term of the court, "in order that the defendants may have an opportunity by that time to pay said judgment with interest and costs." This order "points a moral," and shows that the court had condemned the petitioners in a criminal proceeding, in order to alarm them into paying a judgment against the county of Chambers, which they had used every lawful means (and some that were unlawful) to collect by taxation.

After that, the charge that they had offended the dignity of the court, or the majesty of the law, by any conduct of theirs, which deserved punishment, should never have been made in that court.

The court had confessed that such notions of the contempt of its authority were giving it no concern.

Then, at this appointed time, on the 21st November, the petitioners appeared for sentence under the judgment of the 16th of July, 1881. The expurgation they were required to make was not as to whether they had levied and assessed and collected that tax from the people of Chambers County, or had continued to do so, or to try to do so; but "have you paid Dix & Co. their judgments? and have you paid all the costs of the three proceedings to the officers of the court?" The answer being in the negative, the prison doors were thrown open by the federal court to incarcerate the judges of the state court, there to remain until they should pay the debt and costs aforesaid. Of course the circuit court could not afford to permit the absurdity of allowing the state judges while in jail to attempt to expurgate the contempt by a further compliance with the will of court, after it was made fully and distinctly

known, as it had never been known before through any order or writ in which it was at all explained.

They offered on oath, and almost on their knees, to obey the order of the court as soon as they could know fully and clearly what it was. The court thought that fine and imprisonment was their just desert; and when they were locked in the Montgomery jail, they could not discharge either judicial or ministerial functions in Chambers County. So they were cut off from every means of complying with the judgment of the court, except by the payment of the debt of Chambers County, and the costs.

The court computed the judgment of Dix & Co. with interest and all the costs up to the date of the judgment, and then nicely divided the sum by *three*, and thus ascertained to a cent the amount of fine that the United States should receive for the contempt which each of the petitioners had shown to the orders of the court. Judgment was then rendered in favor of the United States against each defendant for one-third the sum that Chambers County owed Dix & Co., with the interest and costs added. But Dix & Co. and the officers of court were permitted by the judgment to intercept the payment of these fines to the government, by giving receipts, if they chose, to the petitioners for the sums due them from Chambers County, in which events the fines were canceled, or extinguished, or remitted, or pardoned. At least in some way they were to be disposed of, and the petitioners were to be then discharged. Is it not clear, then, that in a state where imprisonment for debt is abolished, as it is in Alabama, that the circuit court of the United States has used its powers of criminal jurisdiction in the place of and instead of a writ of *capias ad satisfaciendum*, to enable judgment creditors to collect their debts, and the officers of court to collect their costs? And is it not equally clear that such a judgment is an excess of jurisdiction; and that it is not the lawful result of any powers which the circuit court had the right to exercise, even under the most lib-

eral interpretation of its jurisdiction, which were evoked or put in motion by the order for a peremptory writ of mandamus in the case?

The key of the prison-door was turned on the prisoners, and was virtually put in the hands of Dix & Co., and the officers of court, who could discharge them at their pleasure, or hold them until the debt of Chambers County was paid, and, in discharging them, could remit the fines due to the United States by the terms of same judgment. All this could be done after the term of the court had closed, and after the court itself had lost all power to remit the fines.

This was either an attempt to collect a judgment and costs by duress of imprisonment, or it was the taking of the bodies of the petitioners *in execution* for the satisfaction of a judgment in the U. S. circuit court.

The right to imprison for a debt in Alabama is decided in a recent case in the supreme court, *Ex-parte* John Hardy, a copy of which is presented with this argument.

That case is very similar to this, and with great ability sustains the right of a citizen to exemption from imprisonment for debt. It declares a statute unconstitutional which enables a court of chancery to imprison, as for a contempt, a debtor who refuses to surrender bonds in his possession to satisfy a judgment.

Justice Summerville, in the opinion, says it is a sound principle "that the legislature could not, by an evasion of the Constitution, render that which was in its essence a suit at law, a proceeding to punish for contempt." . . . . "We are of opinion that the law in its true essence and purpose is one authorizing imprisonment for debt." . . . . "An order committing a defendant for contempt for such refusal (to deliver the bonds to be sold to satisfy the debt) is an imprisonment for debt, and as such is prohibited by said section of the declaration of rights." No court can evade the law by the mere form of its orders. It is the

essence, and not the mere form of the judgment that tests the jurisdiction of a court and the rightfulness of its action.

6th. The imprisonment and the fine were not imposed to compel obedience to the peremptory mandamus; and if so intended, the imprisonment necessarily prevented such obedience by putting it beyond the power of the prisoners to obey.

The matter of obedience to the mandate was wholly lost sight of in the hot pursuit of the means to pay the judgment of Dix & Co. and the costs. What are the other bondholders to do for the payment of their debts from the county, due under the act of 1868, while the court is in jail under an indefinite sentence of imprisonment?

7th. The fine was excessive, as it included the whole sum of the debt and interest due Dix & Co. and the costs of three suits added. If paid by the prisoners to secure a release, it is impossible for them to recover a cent of it from Chambers County, and this is equally the case if they pay the debt to Dix & Co., or the costs.

JOHN T. MORGAN.
JAMES L. PUGH.
THOMAS H. WATTS.

SUPREME COURT, U.S.
FILED
JAN 9 1883
JAMES H. McKENNEY, CLERK

IN THE

Supreme Court of the United States.

October Term, 1881.

EX-PARTE THE STATE OF ALABAMA

AND

EX-PARTE ROWLAND ET AL.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

JAMES L. PUGH,
JOHN T. MORGAN,
THOS. H. WATTS,
For Petitioners.

J. L. Pearson, Printer, 9th and D sts., Washington.

IN THE

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OCTOBER TERM, 1881.

EX-PARTE THE STATE OF ALABAMA
AND
EX-PARTE ROWLAND ET AL.

Supplemental Brief for Petitioners.

1. Petitioners are "in custody for an alleged act done or omitted in pursuance of an order, process, or decree of the Circuit Court of the United States" for the Middle District of Alabama, and apply for writ of *habeas corpus* under sections 751 and 753 Revised Statues U. S., p. 142.

In *Ex-parte* Parks, 3 Otto, 21, the court say: "But where the proceedings are not only erroneous, but entirely void,—as where the court is without jurisdiction of the person or the cause, and a party is subjected to illegal imprisonment in consequence,—the superior court or judge invested with the prerogative power of issuing *habeas corpus*, may review the proceedings by that writ, and discharge from illegal imprisonment. This is one of the modes by which this court exercises supervisory power over inferior courts and tribunals; but it is a special mode and confined to a limited class of cases."

In these expressions the grounds of review and correction of the judgments of inferior courts seem to be more

restricted than were stated in *Ex-parte* Lange, 18 Wall., where it is said, in the opinion of the court, that the facts stated in the petition "very fairly raised the question whether the circuit court, *in the sentence it pronounced*, and under which the prisoner was held, had not exceeded its powers." "And that the authority of this court in such case, under the Constitution of the United States and the 14th section of the Judiciary Act of 1789, to issue this writ, and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court had exceeded its authority, is no longer open to question."

Both the cases referred to were convictions of crimes after indictment and trial by jury. This view of the law is also sustained in *Ex-parte* Seibold, 100 U. S., 371.

It is not the Constitution but the law that denies to the Supreme Court appellate jurisdiction in criminal cases.

The question whether the writ of *habeas corpus* issued by the Supreme Court invokes the appellate or original jurisdiction of that court, has been much discussed, and its decision, in each case, seems rather to depend upon the character of the case and the parties than upon the constitutional distribution of the judicial power of the United States.

Ex-parte Virginia, 100 U. S.
Ex-parte Seibold, 100 U. S., 371.

The writ of *habeas corpus* is the only writ guaranteed to the people by the Constitution, and it is placed on the ground of an inviolable privilege. *Habeas corpus* was always a judicial writ, and it is either a part of, or an indispensable attendant of the judicial power—a writ to aid the judicial power. If the judicial power of the Supreme Court in a given case is original, the writ required to assist that jurisdiction would not be rejected because the same writ would be necessary to assist the appellate power in another class of cases, where the jurisdiction is appellate.

Ex-parte Seibold, 100 U. S., 371.

"The privilege of the writ of *habeas corpus*" must extend to every case of unlawful imprisonment, or else it is of no value.

Ex-parte Virginia, 100 U. S., 340.

It has been frequently granted in causes where the Supreme Court is said to have no appellate jurisdiction, and in such cases has been used to discharge persons in prison who were proceeded against for violations of the criminal laws, both before and after conviction.

In a case of resort to this writ for relief against a sentence of imprisonment by an inferior court, "the question brought forward on *habeas corpus* is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and, therefore, the questions are separated and may be tried in different courts. The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and, therefore, appellate in its nature."

The great weight of opinion and authority on these questions is in support of the decision in Bollman and Swartwout, 4 C., 75, from which the foregoing extracts are taken. Still it would not be insisted that a foreign ambassador unlawfully indicted and convicted, and imprisoned by an inferior court, could not sue out a writ of *habeas corpus* in the Supreme Court and invoke its original jurisdiction to relieve him from such imprisonment. If the lawfulness of the imprisonment can be tried in a different court from that in which the judgment of conviction was rendered, and as a separate suit, there is no reason why it might not be tried in the Supreme Court under its original jurisdiction, if the petitioner is a state or a foreign ambassador.

In one of these cases the State of Alabama sues for the discharge of three civil officers, who hold its commission

and are charged by law with most important public duties, and invokes the original jurisdiction of the court to obtain their discharge from prison.

Those three persons also sue for a discharge from imprisonment, and invoke the appellate jurisdiction of this court. In their case the crime (if committed) is personal, and, possibly, they could not plead their official relations to the State, and the important public trust committed to them, in bar of the right to imprison them for a dereliction of official duty.

In the case of the State, the plea against the imprisonment is founded on the law of public necessity, which requires these officers to be released, that they may discharge the duties which no one else can be found to discharge in accordance with law. And the further plea that the jurisdiction of the state courts is involved, and its judicial officers are imprisoned and its rightful powers imperiled thereby for alleged crimes, not punishable as such by any law of the United States, but if at all, only by a principle of common law, and of which they are convicted without due process of law, or trial by jury. And also the plea that neither the Constitution of the United States, nor any law of Congress, gives to the circuit courts of the United States the power to imprison the judges of the courts of record of the State of Alabama for disobedience of their orders or decrees. And also that the state courts have the same right to determine their powers, jurisdiction, and duties under the state laws, and under the federal laws, that the circuit courts of the United States have to determine said matters for their own guidance under the same laws; both courts being of concurrent jurisdiction and, on an appeal or writ of error, subject to the control of the Supreme Court of the United States, but not to control by each other.

In *Ex-parte* Virginia, 100 U. S., 339, the right of the state to sue out the writ of *habeas corpus* was not disputed by the court. And in considering the question whether

appellate jurisdiction would attach where no *habeas corpus* had been sued out in the district or circuit court, the court say: "It is said no *habeas corpus* was sued out either in the district or circuit court, and that we are not called upon to review the action of a lower court upon such writ."

"This is true, and such a writ from the lower court would have been a more regular proceeding. We cannot say, however, it was indispensable, especially in view of the fact that a state is seeking release of one of her officers, and in view of the former action in this court."

This is perhaps not intended to be a decision of the question of the right of a state to sue for the release of one of her officers, but is a forcible recognition of such right.

The right claimed by the state is analogous to the right of a master to sue for the liberty of his apprentice, of a state to sue for the discharge of a lunatic, of a father to sue for the custody of his child; but it is stronger than any of these, for the state officers are indispensable to the government of the state, and there is no means by which their duties can be performed by others while they are in prison.

Ex-parte Ferrier, 3 Ben. (Ind.), 442.
Commonwealth vs. Kirkbride, 7 Phil. (Pa.), 1.
People vs. Conover, 15 Abb. Pr. Rep., N. S., 430.
41 Texas, 448.
Ex-parte Robbins, 15 Ark., 402,
Ex-parte Jenkins, 2 Wall., 521.
People vs. Pillow, 1 Sandf. Sup. Ct. Rep., 672.
Commonwealth vs. Taylor, 3 Met., 72.
Commonwealth vs. Aves, 18 Pick., 173.
Commonwealth vs. Downes, 24 Pick., 227.
Hurd Hab. Corp., p. 212.

In many cases the state officer could not reach the Supreme Court with any hope of relief if the petition must be filed in his own name, and the state is also excluded from asking relief for him.—Such as excessive imprison-

ment for the non-payment of an excessive fine; or a false return to the writ of *habeas corpus*, alleging a false ground for imprisonment; or a falsification by a clerk of the record of conviction; or a mistake, in the imprisonment of the wrong person; or where the imprisonment is for contempt, by a court having a general jurisdiction to inflict such punishment, and the record is silent as to the facts on which the conviction is based. In all such cases the state could ask the Supreme Court, under its original jurisdiction, to inquire into the facts touching the legality of the imprisonment, while the individual could not invoke those powers.

It is submitted that it is far more necessary that this door of inquiry and examination should be opened to the state, because the officer of the state, in his personal or official character, has no right of appeal or writ of error in criminal causes.

There is a comity between the states and the federal government, and between their tribunals, which was much relied on by the framers of the Constitution to prevent friction and conflict in the conduct of our complex system of government. It is not fully expressed in the written Constitution, but it is broadly implied in the creation of a Supreme Court with original jurisdiction of every suit at law and equity, and of all cases or controversies within the judicial power of the United States, where a state is a party.

That court is the final arbiter of all questions of a judicial nature within its powers that may arise between the states, or in which a state is a party; and in virtue of this jurisdiction, is invested with the high authority to adjust their disputes preserve their rights, aid the authority of their government, and preserve the harmony of their relations towards each other.

2. The "process" of the circuit court was a *mandamus* directed to "P. M. Rowland, judge of probate of Cham-

bers County, Alabama, and *ex officio* judge of the court of county commissioners of said county, and J. W. Forman, R. C. Germany, W. J. Grady, and D. C. Shutze, members of said court of county commissioners," and the "order" of the circuit court in the *mandamus* was as follows: "Now, therefore, you, the said P. M. Rowland, judge as aforesaid, and R. C. Germany, J. N. Forman, W. J. Grady, and D. C. Shutze, members of and composing the court of county commissioners of said county, are hereby commanded, forthwith and without delay, to levy and assess, and cause the collection of, in accordance with the provisions of said act of the general assembly of said State of Alabama, such a tax upon the real and personal property in said county of Chambers as will be sufficient to satisfy said judgment, with interest and costs, and that you continue to levy and assess said tax, and cause the same to be collected as aforesaid, from time to time, until said judgment is wholly satisfied, with interest and cost of suit, and how you shall have executed this writ, make known to us, to the judge of this court, at the next term of said court, on the first day of said term, on, to wit, on the first day in May, A. D. 1876."

3. The above mandate required the *court* of county commissioners "to *levy* and *assess* and *cause* the *collection* of a tax," &c. The *court itself* was required to *levy* and *assess*, and to *cause somebody else* to collect the tax. And the mandate also required the court of county commissioners to *obey and perform* the "order," and to *certify* obedience and performance when the writ of mandamus was returned, *on the 1st day of May*, 1876.

The court of county commissioners could not look *dehors* the writ of mandamus to find *what* and *when* it must obey.

Tapping on Mandamus, pp. 6, 177, 322, 326, 327.

4. The writ of *mandamus* was *functus officio after the "return day" thereof, and the "order" of the circuit court*

therein did not continue to bind the court of county commissioners to obey it after the 1st day of May, 1876.

Tapping on Mandamus, p. 6.

5. The Alabama Statute of 1868, sec. 7, "authorized and required the court of county commissioners to *levy and assess in the same manner as is now required by law for the collection of state and county taxes*, such tax as may be necessary to meet the interest falling due semi-annually on said bonds," &c., provided such tax shall not exceed one per cent. per annum upon the value of the real and personal property in said county, "*as yearly assessed and returned to the proper officers.*"

Section 8 of said act also "authorized and required the said commissioners' court to require the tax-assessors and tax-collectors to assess and collect," &c.

How was the commissioners' court authorized and required to cause the assessment and collection of the tax? It was "invested" by section 8 "with all the powers, privileges, and rights, and bound by the same duty of proceeding against said tax-collectors and tax-assessors, and their sureties, as are vested in, granted to, and imposed upon the auditor (comptroller) of public accounts by law, for the amount of said taxes not assessed, collected, and paid over, or misapplied."

By section 9 of said act "the tax-assessors and collectors are invested and empowered with all the rights and remedies for collecting said tax *as are now provided by law* for the collection of state and county taxes, and bound by the same duties; and the same pains and penalties *as are now prescribed by law* shall attach," &c.

It is manifest that the legal substance of the act of 1868 amounts to no more than a contract by the county that a special tax, not exceeding one per cent. upon the annually assessed value of the real and personal property in the county, shall be levied, assessed, collected, and accounted for in the *same manner* as authorized and required by law

for the levying, assessing, collecting, and accounting for state and county taxes, when the act of 1868 was passed.

The court of county commissioners was to levy the tax for the specific purpose of paying the interest on the county bonds. The tax-assessor had nothing to do with the special tax, as it was levied as a rate per cent. on the value of the real and personal property *as annually assessed for state and other county taxes.* The collector was to collect the special tax as he did other taxes.

For a breach of duty concerning the special tax the court of county commissioners and the tax officers were liable to the same remedies, pains, and penalties as the then state law provided in relation to all other taxes, except that, *as to the special tax*, the commissioners' court was put in the place of the comptroller of the state in the right to sue the assessors and collectors for *penalties* for breach of duty. No power was given; no duty imposed on any court, or official, to order an assessment or to compel the collection of any tax. The commissioners' court, and the tax-assessors, and the tax-collectors, in Alabama, are each independent of the other, with no power in either, over either, and no remedy to enable the commissioners' court to "cause" any tax to be assessed or collected—the only remedy is suit for *penalties*, or on the official bonds, or indictment.

Revised Code of Alabama, 1867, Walker's Compilation.
Assessors' Duty, secs. 471 and 542.
Collectors' Duty, secs. 496–542.
Collectors' Bonds, secs. 494–5.
Penalties Collected by Comm'rs' Court, sec. 566.
Tax Officers Indictable, secs. 567–8.
County Tax, secs. 910–915.

If the assessor had anything to do with assessing the special tax ordered to be levied by the commissioners' court, he could not be required to commence assessing

until after the 1st of March, and he had until the 1st of August to finish—two months after the mandamus had been returned, and was *functus officio:* and the tax-collector had no authority to collect the special tax levied by the commissioners' court until after the 1st of September—four months after the commissioners' court were required by the mandamus to certify that it had "*caused the collection of*" the special tax.

At the time of the service of the mandamus on the members of the commissioners' court, on the 14th day of February, 1876, the law of Alabama required each tax-collector of any special county tax to give a special bond, in addition to his general bond, covering the special tax, before he had authority to collect it. This additional bond was required for the protection of the county, and did not impair any right of bondholders under the act of 1868.

Penniman's Case, 103 U. S. Rep., 714.

6. The circuit court of the United States was bound to take notice of the tax laws of Alabama, and of the authority of the commissioners' court, and of the tax officers under them, when it issued the peremptory mandamus.

These tax laws were certainly a *limitation upon the jurisdiction* of the circuit court to issue the mandamus. If so, *what jurisdiction over the commissioners' court, and over the subject-mutter of the special tax, and over its being levied, assessed, and collected, authorized* the circuit court to command and require, by mandamus, the commissioners' court to "*cause the collection of* the tax it was to levy, and to *certify performance on the return day of the writ?*" Mandamus cannot be granted to oblige A to compel B to do an act, nor to do an act the law does not authorize and require.

Tapping on Mandamus, pp. 16 and 17.

What does the act of 1868 mean when it authorizes and requires the commissioners' court to levy and assess, and cause the collection of, the special tax? Plainly that the

court was to *levy* the tax, and being levied, the rate was fixed on the amount of the general assessment for 1876, and its collection was left to the tax-collector, as required of him by section 9 of the same act of 1868. The commissioners' court could "cause" nothing to be done by *others*, unless the law gave it *jurisdictional power* to compel action.

7. There was no law conferring jurisdictional power on the circuit court to "cause the collection of" the special tax. There was no law imposing the duty, or vesting the commissioners' court with power, to cause any tax to be collected. It follows that that part of the mandate of the circuit court which orders the commissioners' court to "cause the collection of" the tax it was required to levy and assess, and to certify performance by the return day of the writ, was outside its jurisdiction, *coram non judice*, and void.

Ex-parte Yerger, 8 Wallace, p. 94.
Ex-parte Lange, 18 Wallace, p. 163.
Ex-parte Parks, 93 U. S., 3 Otto, p. 19.

8. If the order to levy the tax can be separated from the order to "cause the collection of" the tax, so as to preserve the validity of the mandamus as to the order to levy, then, was the order to levy obeyed? The certificate of obedience was filed by tbe commissioners' court at the return term of the writ of mandamus, and showed on its face that, as "required by said order, a tax of one-fourth of one per cent. on the value of the real and personal property of Chambers County was levied for the purpose set forth in the mandamus, and that the tax-collector was ordered to proceed to collect the tax as required by law." And in the answer of the commissioners' court to the rule nisi, it is shown that the assessed value of the real and personal property in the county, the year 1876, was $1,631,566, and that one-fourth of one per cent. was

more than sufficient to satisfy the judgment, with interest and costs.—(Ex-parte Woodruff, 4 Ark., 630, cited in High Ex. Rem., p. 401. See, also, High on Ex. Rem., § 462, p. 331, as to conclusiveness of the facts stated in the return to the writ of mandamus.) A strictly literal compliance with the terms of the writ is not exacted if it be apparent that it has been substantially complied with in spirit, and such compliance with the material requirements of the mandate of the court will exonerate the respondent from further responsibility.—(High Ex. Rem., § 566, p. 399.)

9. That portion of the mandate requiring the court of county commissioners to "continue to levy and assess said tax, and cause the same to be collected as aforesaid, from time to time, until said judgment is wholly satisfied, was inoperative after the mandamus was returned and became *functus officio*.

In no event will the courts interfere by mandamus in anticipation of a supposed omission of duty, and the writ will not, therefore, go to compel taxing officers to assess a tax, the time for which has not yet arrived, merely upon the presumption that the officers will refuse to do their duty at the proper time.—(High Ex. Rem., p. 120, § 144.)

There could be no contempt of a process or order that had become *functus officio*.

10. If the jurisdiction of the circuit court, in issuing the mandamus and adjudging the petitioners guilty of contempt, was not exceeded, the next and only inquiry left is, was the *punishment* imposed within or outside the jurisdiction of the circuit court? And if within, was there such "irregularity" or "flagrant abuse" in the exercise of jurisdictional power as will justify the interposition of this court?

Riggs vs. Johnson Co., 6 Wall., 166.

Section 725 of the Revised Statutes of the United States invests the circuit court with power "to punish, by fine or

imprisonment, at the discretion of the court, contempts of their authority," &c. And "disobedience or resistance by any party, to any lawful writ, process, order, rule, decree, or command of the court," is a contempt of authority.

In section 4,975 of the Revised Statutes of the United States the power of a court to punish for contempt is "by process for contempt or other remedial process." The power to punish for contempt must be exercised in term time.

In section 4,104 of the Revised Statutes of the United States the power of a consular court to punish for contempt is limited to fine not to exceed fifty dollars, and imprisonment not to exceed twenty-four hours.

Is the *kind*, only, of punishment, or the amount of fine, and time of imprisonment for contempt, one or all, committed to the discretion of the circuit court? Nothing being said in section 725 about the amount of the fine or the time of imprisonment, is there no limitation upon the discretion of the court as to the amount of the fine or the time of the imprisonment? Can the court impose a fine of a million of dollars or imprison for life?

The Constitution of the United States, article 8, declares that "excessive fines shall not be imposed, nor cruel and unusual punishments inflicted." Is the judicial discretion to punish contempts governed by the common law in the imposition of fines and the infliction of imprisonment? If the only rule of limitation is that the fine and imprisonment shall be reasonable, and not excessive or cruel or unusual, then what is a reasonable fine or reasonable imprisonment?

In Alabama, the state circuit court, having concurrent jurisdiction with the United States circuit court of the identical subject-matter and parties involved in the present case, is limited by statute, in the punishment of the same contempt alleged to have been committed in the case now before this court, to fifty dollars fine and ten days imprisonment. What is a reasonable fine and reasonable

imprisonment for *any* contempt, however aggravated, is thus solemnly decided by the legislature of the state where the alleged contempt was committed, to be not exceeding fifty dollars fine and twenty-four hours imprisonment. In remaining silent in section 725, as to the amount of the fine and the duration of imprisonment for a contempt, did Congress intend to put no bridle on discretion or to leave it where it properly belonged, to be regulated by state laws? Sections 914 and 915 and 916 of the Rev. Stat. U. S. can be construed so as to subject the jurisdictional power of the circuit court over the subject-matter of the contempt and its punishment to the government of the state laws. The jurisdiction of the circuit court was invoked to enforce rights and remedies under state laws, and the contempt, if any, was committed against the authority of the court in the execution of state laws. No crime committed against the criminal laws of the state, punished by fine, could deprive the defendant of his liberty if he was able to secure the payment of the fine. No offender can be subjected to imprisonment for the non-payment of a fine if he is able to give security for its payment.

The sentence of the court in the present case was that the members of the commissioners' court "are guilty of contempt in disobeying as well as in continuing to disobey the said peremptory writ of mandamus, and the order and command of this court therein, and that for said contempt each of respondents is here and now sentenced to pay to the United States as a fine for his said contempt the sum of one thousand and eighty-eight dollars, and to be and to stand imprisoned until the said fine and all the cost for this proceeding for contempt are paid; that, in addition to the fines hereby imposed, the sentence is also that said respondents pay all the cost of this proceeding and stand imprisoned until they do so." It is then ordered that the defendants be discharged from the payment of the fine and the imprisonment if they pay and satisfy the debt of Dix & Co.

Can the court imprison until the fine is paid? The fine is the amount of the debt of Dix & Co., and the debt and fine were made the same to prevent payment of the fine instead of the debt.

The imprisonment was nominally to compel payment of the fine but really to force payment of the debt.

Indirectly it was manifestly imprisonment to compel payment of the debt, which is prohibited by the state constitution and section 990 of the Revised Statutes of the United States.

Fine and imprisonment until the fine or debt were paid certainly amounted to an abuse and violation of the jurisdictional power of the court, and was either double and excessive punishment for contempt, or imprisonment for the non-payment, or to compel payment of the debt of another.

If the fine can be extinguished by the payment of the debt to Dix & Co. after the circuit court has adjourned, the court usurps the pardoning power, and continues the imprisonment until the conditions of the pardon are accepted and performed. This is a grave abuse of jurisdiction in a sentence of imprisonment.

11. In Merriweather vs. Garrett, 102 U. S., 472, the court state the law to be that "the power of taxation is legislative and cannot be exercised otherwise than under the power of the legislature." "The taxing power of a state is one of its attributes of sovereignty."

Nathan vs. Louisiana, 8 How., 73.

Lane County vs. Oregon, 7 Wall., 71.

"Taxes are not debts." "They operate *in invitum*." "Nor are they different when levied under writs of *mandamus* for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. The writs of *mandamus* only require the officers of assessment and collection to obey the existing laws."

The legislature "having the sole power to authorize the tax, it must equally possess the power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced."

Merriweather vs. Garrett, 102 U. S., 515.

In Hein vs. The Levee Commissioners, 19 Wall., 655, the court say: "It is well settled in this court that the circuit courts cannot use the writ of mandamus as an original and independent remedy, but are limited to its use as a process in the enforcement of rights when the jurisdiction has been already acquired for other purposes. In fact, in the class of cases in which it is here sought, *it is a writ in execution of the judgment* of the court already rendered, and can only be used because it is an appropriate process for that purpose."

This is certainly a limited and special jurisdiction, in a court of limited and special jurisdiction; and none the less is the jurisdiction limited by the decision of the court, than if it had been so confined by express statute.

In such cases the jurisdiction to order a peremptory mandamus for the collection of taxes does not exist, unless the state law authorizes that to be done by the state officers which the mandamus requires to be done.

The jurisdiction of the U. S. circuit courts being limited to the particular matter of enforcing state laws in such cases, they cannot add to their jurisdiction any of the general powers that they may rightfully claim or exercise under federal laws, over other inferior courts, or over their own officers, or parties to suits in those courts, so as to enlarge this special jurisdiction. If they have any general jurisdiction to issue writs of *mandamus*, it does not apply to the case of the collection of taxes under state laws.

The test of their jurisdiction, therefore, in a case like this, is to be found in the state laws, and nowhere else. The jurisdictional fact on which the validity of their proceeding must be based is that the state laws prescribe and

enjoin upon the state officers the duty which the circuit court requires them to perform.

If this foundation is lacking, the effort to exert such jurisdiction is usurpation; and the effort to supply it through implication by a resort to a supposed general jurisdiction to issue writs of mandamus in other cases, is in vain.

Neither can the circuit courts of the U. S. in such cases, by a mere decision that they have jurisdiction, deprive any court that is trying the validity of an imprisonment under their judgments, of the right to decide, as freely and fully as they could do, whether in law or in fact they had such jurisdiction.

In Shriver's Case, 2 How., 25, and Williamson vs. Berry, 8 How., 495, this subject is treated exhaustively.

Both these cases are strongly in point to show that where a power is given by statute to a court of general jurisdiction, to be exercised in accordance with the statute, a judgment rendered in the exertion of the power, to be valid, must conform to the statute, and anything done beyond the authority of the statute invalidates the judgment. In Williamson vs. Berry the court say: "The operation of every judgment depends upon the jurisdiction of the court to render it. Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceded by the judgment. . . . . The rule is that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create the necessity for an appeal." This case was overruled, and one point in Saydam vs. Williamson, 24 How., 427, but the doctrines above quoted were not departed from, or in any manner questioned. It is cited approvingly in Kilbourn vs. Thompson, 103 U. S., p. 198, which is also a strong case to support this point.

The contempt proceedings in this case are based upon the judgment awarding the peremptory writ of mandamus, rendered five years previous to the issue of the rule to

show cause why the defendants—the members of the court—should not be attached. If the order for the peremptory mandamus required the defendants as a court, or as individuals, to do an unlawful act, or an act which the circuit court had no jurisdiction to require to be done, the order exceeded the jurisdiction of the court, and is void.

The record discloses fully the grounds of jurisdiction on which the order for peremptory mandamus was based.

Nothing is left to intendment or implication. The record shows that the judgment is beyond the jurisdiction of the circuit court.

The power of the circuit courts to punish for contempt, if it was ever as broad as that of courts of common-law origin, is expressly limited by statute, and cannot be expanded by implication. In a case like this, the orders of the court must be lawful, or else there is no power to punish for contempt any one not an officer of the court for disobedience to them; and the record on which the contempt proceeding is based shows that the orders were unlawful.

In one respect, not mentioned in the former brief, it seems clear that the court has proceeded against the wrong parties by mandamus, and also for contempt. If any of the officers of the state were bound to levy, assess, and collect the taxes mentioned in the mandamus proceedings, these duties were by the general laws of Alabama, and also by the act of Dec. 31, 1868, imposed upon three distinct classes of officers, viz: the duty of levying the tax, which the record shows was duly performed, upon the court of county commissioners; the duty of assessing the taxes upon the assessor, and of collecting the taxes upon the tax-collector. The assessor and collector are not officers or servants of the court of county commissioners. They are not subject to be dealt with by that court in relation to the duties imposed upon them by law. The state circuit courts have that jurisdiction. If the circuit courts of the U. S. have jurisdiction to proceed by mandamus to compel them to

assess and collect this special tax, there is no reason why, in this case, it has not been done.

The mandamus was to the wrong party, and the proceedings based upon it are for the non-performance of an alleged duty by the court of county commissioners, which other ministerial officers alone could perform.

The proceedings in attachment for contempt are always strict in the steps before the attachment issues, and all documents upon which they are awarded must be filed with the court. This is to show the jurisdiction of the court.—(U. S. vs. Coldwell, 2 Dall. Cir. Ct. (Pa.), 333.) They are deemed on the civil side until attachment is directed to issue. They then become criminal in their nature and the United States is the plaintiff.

U. S. vs. Wayne, Wall. Cir. Ct. Rep., (3d Cir.,) 134.

Even where the defendant is a private person, the plaintiff must state in the proofs on which the application is founded, the specific acts of omission or commission on the part of the defendant which constitute the alleged contempt.

Parkhurst vs. Kinston, 2 Blatch., 76.

In the case of an attachment against judges for their acts or omissions in the course of their duties in their courts, the specific acts of commission or omission should be carefully stated.

In this case they were never stated in the rule *nisi* for mandamus, nor in the peremptory writ, nor in the rule to show cause why the judges should not be punished for contempt, nor in the judgment of conviction, nor in the sentence of imprisonment.

In the order for the rule made May 23, 1881, they are required to "show cause why an attachment should not issue against them for *violating* and *disobeying* the said peremptory writ of mandamus." This is the only allegation of default in the indictment. It contains no fact but the general violation and disobedience of an order which con-

tains three distinct requirements. In the judgment of conviction under this attachment, rendered July 16, 1881, there is no statement of facts from which it can even be inferred in what the default consisted, and they are "adjudged guilty of contempt of this court *in relation to said writ.*"

"Failure to obey said writ" is the only cause assigned for the conviction of this crime, and is followed by punishment which, if imposed by statute, would shock the common sense of the country, if it did not invalidate the law as being unconstitutional. And, so in the final judgment on the attachment proceedings, it is stated that on the 16th of July, 1881, "the said respondents were duly and properly adjudged and found by this court to be guilty of contempt of this court *in relation* to said peremptory writ of mandamus mentioned in this proceeding for contempt, and in disobeying said last-named writ, but that said respondents were required to appear in this court on the first day of this term, to receive such sentence as this court may deem meet to pronounce in the premises." Even this part of the order, or sentence, covered more ground than the conviction had at the previous term of the court included. But the court goes further with recitals, not of facts, but of judicial or extra-judicial asseverations, in order to support the sentence which is to follow, and makes a new conviction, on a case which the defendants were never called upon to answer to, or defend against, by any proceeding whatever. It is as follows:

"And it is now made further to appear to this court that respondents have not obeyed said peremptory writ of mandamus, *nor certified any such obedience*, but still continue to disobey said peremptory writ of mandamus, and that said parties are guilty of contempt in disobeying said peremptory writ of mandamus." . . . . "It is, therefore, considered, ordered, and adjudged by this court that said respondents, the said P. M. Rowland, D. C. Shultze, and R. C. Germany, are guilty of said contempt in disobeying

as well as in continuing to disobey the said peremptory writ of mandamus and the order and command of the court therein, and that for said contempt each of said respondents is here and now sentenced by this court," &c., &c.

Which of these convictions for contempt supports the sentence imposed by the court? Is it that of July 16, 1881, or of November 21, 1881?

Both convictions are for the same offence, the disobedience to the same mandamus, and both cannot stand.

The last conviction is not predicated on any process distinct from that on which the first was had. If the first was valid, the second is void. And it is only upon the second conviction that the penalty "for continuing to disobey" the mandamus is imposed by the court, or could be, for there is no such charge or finding in the first conviction, or in the proceedings that led to it. The power of the court to convict for contempt in disobedience to the mandamus before July 16, 1881, was exhausted by that judgment, and there is no proceeding for any contempt since that time to which the defendants were called to answer or could have answered.—(Ex-parte Lange, *supra.*)

JAMES L. PUGH,
JOHN T. MORGAN,
THOS. H. WATTS,
For Petitioners.

SUPREME COURT U. S.
FILED
JAN 4 1882
JAMES H. McKENNEY

Supreme Court of the United States

No. 11, ORIGINAL. OCTOBER TERM, 1881.

Ex parte: In the matter of Peter M. Rowland, D. C. Shultze, and R. C. Germany, Petitioners. } Petition for writs of *Habeas Corpus* and *Certiorari.*

No. 12, ORIGINAL. OCTOBER TERM, 1881.

Ex parte: In the matter of The State of Alabama, Petitioner. } Petition for Writs of *Habeas Corpus* and *Certiorari.*

BRIEF OF SAM'L F. RICE AND A. A. WILEY,

ATTORNEYS FOR THE U. S MARSHAL.

Supreme Court of the United States

No. 11, ORIGINAL. OCTOBER TERM, 1881.

Ex parte: In the matter of Peter M. Rowland, D. C. Shultze, and R. C. Germany, Petitioners. } Petition for writs of *Habeas Corpus* and *Certiorari.*

No. 12, ORIGINAL. OCTOBER TERM, 1881.

Ex parte: In the matter of The State of Alabama, Petitioner. } Petition for Writs of *Habeas Corpus* and *Certiorari.*

In obedience to the order made in the above entitled causes on the 19th day of December, 1881, that the marshal of the United States for the Middle and Southern Districts of Alabama show cause before said supreme court, on the 9th day of January, 1882, why a writ of *habeas corpus* should not issue, as prayed in each of said petitions, the said marshal has shown such cause in his return and placed his return on file in that court.

Said return shows, among other things, the following facts:

At the May term, 1875, of the circuit court of the United States for the Middle District of Alabama, Dix and Company, aliens, duly recovered in that court a judgment for $2,040.58, besides fifty-one dollars costs of suit, against the county of Chambers, upon past due interest coupons which were originally attached to certain bonds issued and put in circulation by that county, under and by virtue of an act of the legislature of Alabama, entitled "An act to authorize the several coun-

ties and towns and cities throughout the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests," approved December 31st, 1868—a general and public statute of Alabama.

(This legislative act has been noticed and commented on by this court in Chambers county v. Clews, 21 Wallace, 317, and in County of Greene v. Daniel 102, U. S. Rep. 187. It is found in pamphlet acts of Alabama of 1868, pp. 514–520. Its most material provisions relating to the matters here involved are contained in sections 7, 8, 9 & 12, which are set forth in the brief for prisoners heretofore presented to this court, and which are therefore not repeated herein.)

Under said judgment a writ of *fieri facias* was issued to the said marshal, and by him duly returned on the 6th day of August, 1875, "no property found."

On the 15th November, 1875, Dix and Company filed in said circuit court their petition, duly addressed and duly verified, stating therein the facts herein above set forth, and also that said judgment was wholly unsatisfied; that the court of county commissioners of Chambers county (mentioning the names of its members) was authorized and required by said act of said legislature to levy and assess, according to that act, a tax upon the real and personal property in said county for the payment of said coupons as the same fell due, but had "wholly neglected, failed and refused, and still neglect, fail and refuse to levy and assess said tax or any part thereof," and that Dix and Company were wholly without remedy in the premises, unless it was afforded by a writ of *mandamus* against said court of county commissioners, and praying "that a writ of *mandamus* or such other appropriate and remedial writ, as the facts hereinbefore stated will warrant, may issue" against that

court then composed of said Rowland, Shutze, Germany (and two other persons whose names were mentioned but who have recently died), and their successors in office, commanding them to levy and assess, in accordance with said statute, such a tax as would be sufficient to satisfy said judgment, interest and costs, "*and that they continue to levy and assess said tax as aforesaid, from time to time*, until said judgment is wholly satisfied, with interest and costs of suit."

This petition of Dix and Company, and the facts existing when it was filed and therein stated, taken together and appearing of record, constitute the basis, and the proper and sufficient basis, for the subsequent proceedings resulting in the conviction for contempt here complained of.

Under this petition of Dix and Company, an alternative writ of *mandamus* was ordered and issued, which shows on its face all the facts necessary to entitle them as matter of right to a peremptory *mandamus* in the form and to the extent in which the peremptory writ was actually issued some fifteen or more days *after the alternative writ had been duly served on every member of said commissioners court.*

Although the alternative writ was duly served on all the members of that court, on or before December 2d, 1875, it was never answered in any way by any of them; and all the foregoing facts appearing from the record, the said circuit court, after waiting upon them for some seven or more days after they had been served as aforesaid, properly proceeded to order the peremptory writ of *mandamus* to be issued; and that writ did thereafter issue on the 17th day of December, 1875, and was duly served on them on the 14th day of February, 1876.

On May 3d, 1876, they filed their return to said peremptory writ, and therein expressly mention that writ, and treat it as free from objection, and claim that what

little they therein show to have been done by them was done '*in pursuance of*" that very writ.

On May 23d, 1881, said circuit court, *in the exercise of its undeniable jurisdiction*, quashed their said return to said peremptory writ, and immediately thereafter and on the same day ordered the rule against them to show cause why they should not be punished for their contempt in disobeying that writ.

They were afterwards, and during said May term, 1881, heard at length in showing cause, and were found guilty of said contempt, but obtained indulgence and suspension of punishment to the then next term, in order that they might have further opportunity to do their duty as to said judgment of Dix and Company.

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It is too clear for argument, that the imprisonment here complained of is not imprisonment for debt, but imprisonment for not paying the fines imposed, in accordance with the decision *In re Chiles*, 22 Wallace, 168, for *contempt* and the costs of the proceeding for the contempt; and that this imprisonment may be terminated *at any moment by the mere act of the prisoners*, to-wit: by the payment of the fines imposed for contempt and the

costs of the contempt proceeding, without paying any of the judgment debt of Dix and Company or of any of the costs, except merely the cost of the contempt proceeding.—State v. Ouachita Parish Judge, 31 La. Ann. 116.

Nor is argument deemed necessary to expose the indefensible assertion of prisoners' counsel, that the sentence of the circuit court is "either an attempt to collect a judgment and costs by *duress of imprisonment*, or it was the taking of the bodies of the prisoners *in execution for the satisfaction* of a judgment in the United States circuit court." The return of the marshal in this matter fully and correctly shows, that the prisoners are detained "under a conviction and sentence by a court having jurisdiction of the cause," a court of competent jurisdiction to convict and punish the prisoners for *their contempt* in disobeying a peremptory *mandamus* issued to them by it in the exercise of its unquestionable jurisdiction.—Ex parte Siebold, 100 U. S. Rep. 375; Ex parte Kearney, 7 Wheaton, 38.

According to all the authorities, this jurisdiction of the circuit court of the United States, derived as it is from the *Supreme Law* of the land, can not be paralyzed, hindered or impaired by any provision of a State constitution or State law abolishing imprisonment for debt.

The circuit courts of the United States are courts of *limited* jurisdiction; but they are not, on that account, inferior courts in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erro[illegible] and may in the cases in which a writ of error or [illegible] by law, be reversed for that cause. [illegible] versed, they are binding on all the w[illegible] v. Sullivant, 10 Wheaton, 192; Ex [illegible] kins, 3 Peters, 201–209,—except in t[illegible] which Ex parte Siebold, 100 U. S. R[illegible]

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in which a person is imprisoned under a sentence of a United States circuit court, upon conviction of a crime *created by* and indictable under *unconstitutional acts of Congress.* In that class of cases, "the question of the court's *authority* to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having authority to award the writ." And the reason for this is, "because if the laws are unconstitutional and void, the circuit court acquired *no jurisdiction* of the causes. *Its authority* to indict and try the petitioners *arose solely* upon these laws."—100 U. S. Rep. 374–377.

There is no color here for a pretense that the law under which the conviction and sentence and imprisonment here complained of occurred, is unconstitutional, or that it did not confer upon the circuit court of the United States for the Middle District of Alabama authority or jurisdiction to punish by fine and imprisonment for contempt of its authority in disobeying a peremptory writ of *mandamus* issued by it in the exercise of its jurisdiction to enforce the collection or satisfaction of a judgment previously rendered by it on a contract which, upon any just interpretation of it, included the right of the plaintiff in such judgment to demand of the court the issue of such *mandamus.* Neither the authority of that court to issue such *mandamus*, nor its authority to punish the contempt in disobeying it, ought to be considered an open question. In re Chiles, 22 Wallace, 157, the opinion of the court contains the following language:

"Section 725 of the Revised Statutes declares that the courts of the United States shall have power to punish, by fine and imprisonment, for contempts of their authority. And among the cases specially enumerated are disobedience or resistance by any officer of the court, or any party, juror, witness, or other person, to

any lawful process, order, rule, decree or command of the said court. Such has always been the power of the courts both of common law and equity. The exercise of this power has *a twofold aspect*, namely: First, *the proper punishment of the guilty party for his disrespect to the court or its order;* and the second, *to compel his performance of some act or duty required of him by the court, which he refuses to perform.*

In the former case, the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offense. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act required of him, or shows that it is not in his power to do so."

Contempt of court is a specific offense, by virtue of law which, in the United States, has uniformly been treated as constitutional and valid. It is, in its very nature, different from an act or omission which was never declared to be, or treated as a crime, or as punishable, except by an unconstitutional and void legislative act. The courts of the United States, from the time of their existence, have always had power to punish contempts of their authority or process or orders. But they have never had power to punish any act or omission, which has never been declared punishable except by an unconstitutional and void act of Congress. And whilst the authority of the court to try and imprison a person, where its authority "*arose solely*" upon an unconstitutional act of Congress, and had no other foundation or source, may be reviewed on *habeas corpus*, as stated in Ex parte Siebold, *supra;* yet, such a conviction and sentence by a circuit court of the United States having jurisdiction of the case, for such a contempt as is shown in the present case, can not be reviewed on *habeas corpus*.—Ex parte Kearney, 7 Wheat. 38; New Orleans v. Steamship Co., 20 Wallace, 387;

Hayes v. Fischer, 102 U. S. Rep. 121; Ex parte Siebold, *supra;* Ex parte Tobias Watkins, 3d Peters, 193.

The writ of *habeas corpus* "can not be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a *habeas corpus*, that a prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error on appeal to review the judgment." * * * * "But the general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by *habeas corpus*. The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void."—Ex parte Siebold, *supra.*

It is now authoritatively settled that the appropriate remedy for enforcing a judgment, rendered in a federal circuit court against a municipal corporation upon obligations like the coupons on which Dix and Company recovered judgment, is the writ of *mandamus*. It is equally as well established that the circuit courts of the United States have power to issue the writ to municipal officers, requiring the levy, assessment and collection of the necessary tax, according to the State statute under which such obligations were issued, to pay such judgment. Jurisdiction is not exhausted by the rendition of judgment; and as the said circuit courts have power to render a judgment against a municipal corporation,

they have also power to enforce its satisfaction by *mandamus*. In such cases, the writ stands in lieu of an execution, issued upon such judgment.

Knox County v. Aspinwall, 24 Howard, 385.
Pollock v. Lawrence County, 2 Pitts' R. 142.
Riggs v. Johnson county, 6 Wall. *supra*.
Heine v. Levee Commissioners, 19 Wall. *supra*.
Graham v. Norton, 15 Wall. 427.
County of Greene v. Daniel, 102 U. S. 195; and the other cases cited herein.

In such cases the writ of *mandamus* is never issued by such courts in the exercise of *original* jurisdiction. That is, those courts can not entertain a proceeding the sole object of which is to obtain the writ, and determine the relator's rights. They can only issue the writ after the indebtedness has been put into judgment, and as *process* to carry it into execution. In short, those courts can only issue this writ in cases where their jurisdiction has already attached, and where its *use* is necessary to the *exercise* of that jurisdiction. It is an *ancillary* and and not an *original* proceeding.

McIntire v. Wood, 7 Cranch. 504.
Kendall v. United States, 12 Pet. 524.
Board of County Commissioners of Knox County v. Aspinwall, 24 How. 384.
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cess of execution to enforce a judgment. "It is in the nature and place of an execution."

Thompson v. United States, 103 U. S. p. 484.
Edwards v. United States, 103 U. S. 4 71.
Commissioners v. Sellew, 99 U. S. 624.

Such judgment creditors as Dix and Company became entitled, as matter of right, to a peremptory *mandamus* out of the court which rendered the judnment in their favor, whenever the following facts co-existed and appeared upon the record or files of that court: 1. The rendition of judgment by that court upon said past due interest coupons; 2. The issue of a *fieri facias* on the judgment to the marshal, and the marshal's return thereon "no property found;" 3. The failure or refusal of the officers authorized and required by the State statute to levy and assess, according to its provisions, such tax as was necessary "to meet the interest falling due semi-annually on said bonds," that is to say, the interest coupons attached to such bonds, as they fell due, and upon which coupons, after they had become dishonored, the judgment was rendered.

The failure or refusal of said officers to make such levy and assessment was sufficiently proved, by the recovery of the judgment on these past due and dishonored coupons, and the return of 'no property found' on said *fieri facias*, and by the verified petition of Dix and Company for a mandamus and its service upon all these officers and their failure to answer that petition, all of which facts appeared on the record and files of said Circuit Court *before and at the time* said peremptory mandamus was ordered and issued.—That peremptory mandamus, as issued, was due to Dix & Co. as *matter of right*, when it issued; and no court would or ought to set it aside or diregard it.

Knox county v. Aspinwall, *supra*.
County of Greene v. Daniel, 102 U. S. R. 187.

The usual practice may be for an *alternative* writ to issue returnable on some designated day, requiring the duty to be performed, or that the respondents show cause against it. A peremptory writ may, however, be issued in the first instance, and without all this delay. This was clearly and authoritatively settled in Commissioners of Knox County vs. Aspinwall, 24 Howard, 385—the very first *mandamus* case in the United States Supreme Court and ever since the leading case concerning the enforcement of municipal bonds—and was one of the points in the case. Its authority has never since been denied or questioned by the U. S. Supreme Court. High's Ex. Legal Remedies, §§ 573–576 and notes.

Mandamus in the federal courts is but *process*, like an ordinary execution, and all the power to issue it is drawn from the same section of the law, conferring the power to issue writs of *fieri facias*. No good reason can be shown why an application to the Court in the first instance is necessary in order to obtain this writ, when all other final process in a common law cause is issued by the Clerk and of course.

Wayman v. Southard, 10 Wheaton, 1.

Bath County v. Amy 13 Wall, 248.

The authorities cited and relied on in the brief of Counsel for the prisoners, may apply to cases where *mandamus* is an *original* proceeding, in the nature of *a new suit*. They have no just application whatever to a *mandamus* in the federal Courts, to enforce or collect a judgment which is in no sense a suit, but *process* merely. It, like any execution issued to enforce a judgment, is amendable; and when the facts justifying an amendment appear of record, it will be treated as amended accordingly.

Mayor v. Lord, 9 Wallace, 413.

The alleged variance therefore, between the alterna-

tive and peremptory writs of *mandamus* in this—that the peremptory writ contains the words, "collect or cause the collection of" &c, which words do not appear in the alternative writ—is wholly immaterial: and even if objection had been taken at the proper time by prisoners on or before *their return* to the peremptory writ, it would have furnished no reason for setting aside the peremptory writ. The alternative *mandamus* served on the Commissioners gave them every opportunity of defense as to every fact which could affect the right to a peremptory *mandamus*. It was not even necessary that a previous alternative writ should have issued. "There was no dispute about facts *which could affect the decision.*" The peremptory *mandamus* was properly awarded.

The Board of Commissioners of Knox Co. v. Aspinwall, *supra.*

High's Extraordinary Legal Remedies §§ 565–567 and 568.

Commissioners vs. Sellew, 99 U. S. *supra.*

Edwards vs. United States, 103 U. S. *supra.*

Thompson vs. United States, 103 U. S. *supra.*

Other cases cited, *supra.*

But even if the alleged variance, had been material, and the peremptory writ had been irregularly issued, such an irregularity in practice, would not avail as a justification of those who have violated the mandate of the writ. And it is no sufficient objection to proceedings in attachment, that the Court issued the peremptory *mandamus* before an alternative writ had been allowed.

State vs. Elkinton 1, Vroom 335.

High on Extraordinary Legal Remedies §§ 568–576.

Thompson vs. United States, 103 U. S.

Ex parte Stickney, 40 Ala., 160.

Implicit obedience is in all cases, required to the mandate of the peremptory writ, and a violation thereof

constitutes a gross contempt of Court out of which the writ issued. No irregularities in the granting of the writ can be urged as an excuse for failure to obey its mandate, whenever and wherever the Court has jurisdiction to issue such writ.

High's Extraordinary Legal Remedies § 565.

Ex parte Stickney, 40 Ala., 160.

It is contrary to reason and precedent, that to a rule to show cause against a person why he should not be attached for contempt for disobeying a peremptory *mandamus* issued as process to enforce a judgment, he should be allowed to urge defects in that writ, or in the alternative writ.

11, U. S. Dig. N. S. 149 § 8.

Wilcox vs. Harris, 59 How. (N. Y.) Practice, 262.

High's Ex. Legal Remedies §§ 573–576, and cases cited in notes to those sections.

The remedy, contained in said act of 1868, consists of divisible parts, 1st., the duty imposed by said 7th section upon the Court of County Commissioners *to levy and assess*, in the manner therein shown, "such tax as may be necessary to "*meet the interest falling due semi-annually* on said bonds;" 2nd., the duty imposed by said 8th section, upon the Court of County Commissioners "*to require the tax assessors and tax collectors to assess and collect said tax;* and also the duty of that court "of proceeding against said tax assessors and collectors and their sureties," for any default in their respective duties, as prescribed by then existing law, as the auditor of public accounts was then authorized by law to proceed against these officers and sureties, "for the amount of *said taxes not assessed, collected and paid over, or misapplied.*"

The efficiency of this remedy becomes conspicuous, when it is remembered that by the laws of Alabama then existing, the tax assessors and collectors for all

county taxes were the assessors and collectors also for *all State* taxes, that these officers (especially the tax-collectors) were absolutely essential to the life of the State, and that its operations were dependent upon and could only be continued by collection of taxes—its revenue. At that time the modern invention of repudiators had not assumed the guise of legislation, nor received any countenance from either the people, legislature, or press of Alabama. Under the condition of the laws and of public sentiment, which existed when said bonds were authorized by said act of 1868, honest men throughout the world were thereby assured, that the remedy therein provided was complete, and that the legislature of Alabama never could by any subsequent act either destroy that remedy, or render it less efficacious. The supreme law of the land—the constitution of the United States—rendered this assurance "doubly sure." That remedy formed a part of *the obligation* of every coupon issued under the provisions of the act of 1868; and any subsequent act, which destroyed that remedy, or *lessened its efficiency*, impaired the obligation of the contract evidenced by such coupons, and is void as to them.

The act of the Alabama legislature of March 4th, 1876, (passed after the peremptory mandamus had been awarded,) was manifestedly designed to enable the tax-collectors to collect all "ordinary *State and county* taxes," and thereby give them the means to live and carry on their operations; but at the same time to wholly exempt the very same officer, who collected the said State and county taxes, from any duty whatever to collect any tax levied or assessed, under said act of 1868, to pay said coupons. This repudiating device, under the garb of law, cannot be sustained without destroying, or materially impairing, the efficacy of that remedy, which entered into the obligation of the contract, made with the bond-holders, under said act of 1868.

Conceding that the State legislature might *change* the remedy by providing another *equally as efficient*, it is settled that the obligation of the contract "is impaired, in the sense of the constitution, when the *means* by which a contract at the time of its execution could be enforced, that is by which the parties could be obliged to perform it, are rendered less efficacious by legislation operating directly upon the means."

Wolff v. New Orleans, 103 U. S. R. 367.

Van Hoffman v. city of Quincy, 4. Wall. 535.

Benbow v. Iowa 7 Wall. 313.

Dillon on municipal corporation, Sec. 114.

Butz v. Muscatine 8 Wall. 175.

Edwards v. Kearzey, 96 U. S. R. 595.

United States v. Lincoln county, 5 Dillon's Cir. Ct. R. 184.

In Riggs v. Johnson county, Wallace 194, the court said: "Where a State has authorized a municipal corporation to contract and to exercise the legal power of taxation to the extent necessary to meet the engagement, the power thus given cannot be withdrawn until the contract is satisfied." In Van Hoffman v. City of Quincy *supra*, the court said: "When the bonds in question were issued, there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, *as it accrued from time to time*, upon the entire debt. But for the act of the 14th February 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient, and it is not certain that anything will be yielded applicable to that object. *To the extent of the deficiency*, the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as amended. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist." * * * * "*The laws requiring taxes to the requisite amount to be collected, in*

force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it effects these bonds, a nullity. It is the duty of the city to impose and *collect* the taxes in all respects as if that act had not been passed."

As to the interest on said bonds issued under said act of 1868, the said act of March 4, 1876, which is here assailed, can have no force; for it is clear that that act can not operate without *diminishing* the rights, powers and duties of the tax collectors, as they existed when said bonds were authorized.

Embarrassments thrown by a statute in the way of enforcing payment of a debt, or a statutory substitution for the obligation and liability of the debtor of the will of some other person, though that person be a State, have not heretofore been recognized as consistent with the Constitution. On the contrary, "all State legislation" is attended by and subject to the following qualification, that "its action shall not conflict with the pro-"hibitions of the Constitution of the United States, and, "among other things, shall not operate directly upon "the contracts" of any of its municipal corporations so as to impair their obligation by abrogating or *lessening the means* of their enforcement," "so long as the corporation continues in existence." Whilst the corporation continues in existence, all State legislation in respect thereto, "must be exercised in subordination to the principle which secures inviolability of contracts."

Wolff v. New Orleans, 103 U. S. Rep. 365–369; which shows Meriwether v. Garrett, 102 U. S. 472, to be in harmony with these positions and views, and reaffirms Von Hoffman v. Quincy, 4 Wallace, 535.

It is well, in passing, to call attention to the fact that the peremptory writ of mandamus, for the disobedience of which the prisoners are now in jail, was

awarded on the 9th day of December, 1875, nearly three months *before* the said act of March 4, 1876, was passed

The tax collector had executed his official bond under the existing laws, for the collection of the special mandamus tax required to be collected by the mandate of the writ, *before* the said act of 1876 was enacted. It is difficult, therefore, to see how, in any aspect of the case, said act of 1876, even if constitutional, can be urged as an excuse or justification for failure to obey the said peremptory writ of mandamus. But, moreover, the return of the United States' Marshal for the Middle and Southern Districts of Alabama, on file in this case, (including the statement of Judge Bruce) shows that the prisoners, as commissioners of said county, never sued or ruled the tax collector, or his sureties, or made any effort to collect, or cause the collection of, said mandamus tax, *except only* that long after said peremptory mandamus had been served on them and after the passage of said act of March 4, 1876, and on 24th April, 1876, they made the order as to one-fourth of one per cent., which is set forth in their return to said peremptory writ and also in their return to the order to show cause why they should not be punished for contempt.

Their said order of April 24, 1876, purports to be made in compliance with said peremptory mandamus which had been served on them on the 14th February 1876; but it is not a compliance with nor in obedience to that mandamus. It was a mere order for "a tax of one-fourth of one per cent on the value of the real and personal property *of Chambers county* for the purpose above set forth" (in the preamble of said order) "and that the tax collector proceed to collect said tax as required by law."—This order was clearly insufficient and illegal, as will appear by comparing it with the peremptory mandamus and with said act of 1868.

The peremptory mandamus required and commanded said Commissioners' Court to levy and assess and

cause the collection of, in accordance with said act of 1868, "such a tax upon the real and personal property *in said county* of Chambers, as will be sufficient to satisfy said judgement with interest and costs" &c., &c. But the said order of said Commissioners' Court, in utter disregard and contempt of the mandamus, ordered a tax, not "upon the real and personal property *in said county*," but only upon "the value of the real and personal property *of Chambers county*."—That order being in plain evasion of the mandamus and of the law, made it easy for the tax collector and tax payers of that county, who appear to have well understood that the Commissioners' Court was not concerned to do its duty, or to collect the tax required by mandamus.

The law of the land, as well as the peremptory mandamus, required said Commissioners' Court to perform *its whole duty* as plainly exhibited and set forth in said act of 1868 and in that mandamus.

The People v. Mead, 24 N. Y. (Smith) p. 124.

Yet the record shows that said Commissioners' Court has never performed any part of that duty; and that its only pretense of performance consists of its said order of April 24, 1876, which *never was and never could be effectual* as to the judgement creditors, and which the members of that court must be charged with knowing could never be effectual in favor of such creditors. For the truthful return of "no property found," made in August 1875, by the marshal on the execution in favor of Dix and Company, had established the fact that Chambers county had no property. And after that, it was deemed by the said Commissioners Court entirely safe for *the tax payers* of that county, for that court to order a tax, not on any property of any of these tax payers, but on property *of said county*, which could not be found because it did not exist.

The said act of 1868, plainly imposed the duty upon said Court of County Commissioners to make such use

of the powers conferred by said act as to pay said coupons *as they severally fell due*, and not to allow any of them to become dishonored *by the failure of said Court of County Commissioners to do its whole duty*. Said act also made it the duty of that court, and gave it the power, in every case in which said coupons had fallen due *in preceding years* and had not been paid, (as in the case of the coupons of Dix & Co.,) to use its taxing power over property in the county, which had been returned as liable to taxation, but had not been taxed at all, *in said preceding years*, in order to meet and pay any coupons whatever issed under said act. In other words, said Court of County Commissioners had the power, and were under the duty to exercise, whenever necessary, its entire power, *nunc pro tunc*, so as to secure the payment of all past due coupons, as early as possible after the holders of them gave notice in any manner that they desired the payment thereof. All duties of this kind have been persistently denied and repudiated by that court and its members. The duties of that court, in this respect, were *continuing*, and did not cease until actually performed. The peremptory mandamus, by express words, imposed such *continuing* duties upon said Court of County Commissioners, as well as the individual members thereof, and their successors in office; and the mandate of that writ could and would have been obeyed, but for the continued repudiation of any such duties by said Court of County Commissioners and its members. "Obedience to the writ is required during the entire time it remains in force;" and a failure or refusal to obey, subjects the recusant parties to an attachment for disrespect of the court out of which such writ issued.

High's Ex. Legal Rem. § 567.

Kaye v. Kean, 18 B. Mon (Ky.) p. 839.

Perhaps, it is not strange, that the members of this Commissioners' Court who have so long persisted in

utter disregard of their plain duties, of the rights of the judgment creditors, and of the authority of said said Circuit Court of the United States, and who, during this long period, have enjoyed so much of the indulgence and favor of that Circuit Court, should now have deluded themselves into the belief, that the long delayed sentence of that court against them is oppressive, excessive, and cruel.—But no such belief can be entertained by impartial citizens who are acquainted with the facts of this case, who desire to maintain the supremacy of the law, and who know that the lawless must be practically discouraged by teaching the salutary lesson, that wrongdoers cannot be allowed to obtain advantage or profit by wrongdoing.

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FILED
JAN 12 1882
JAMES H. McKENNEY, Clerk

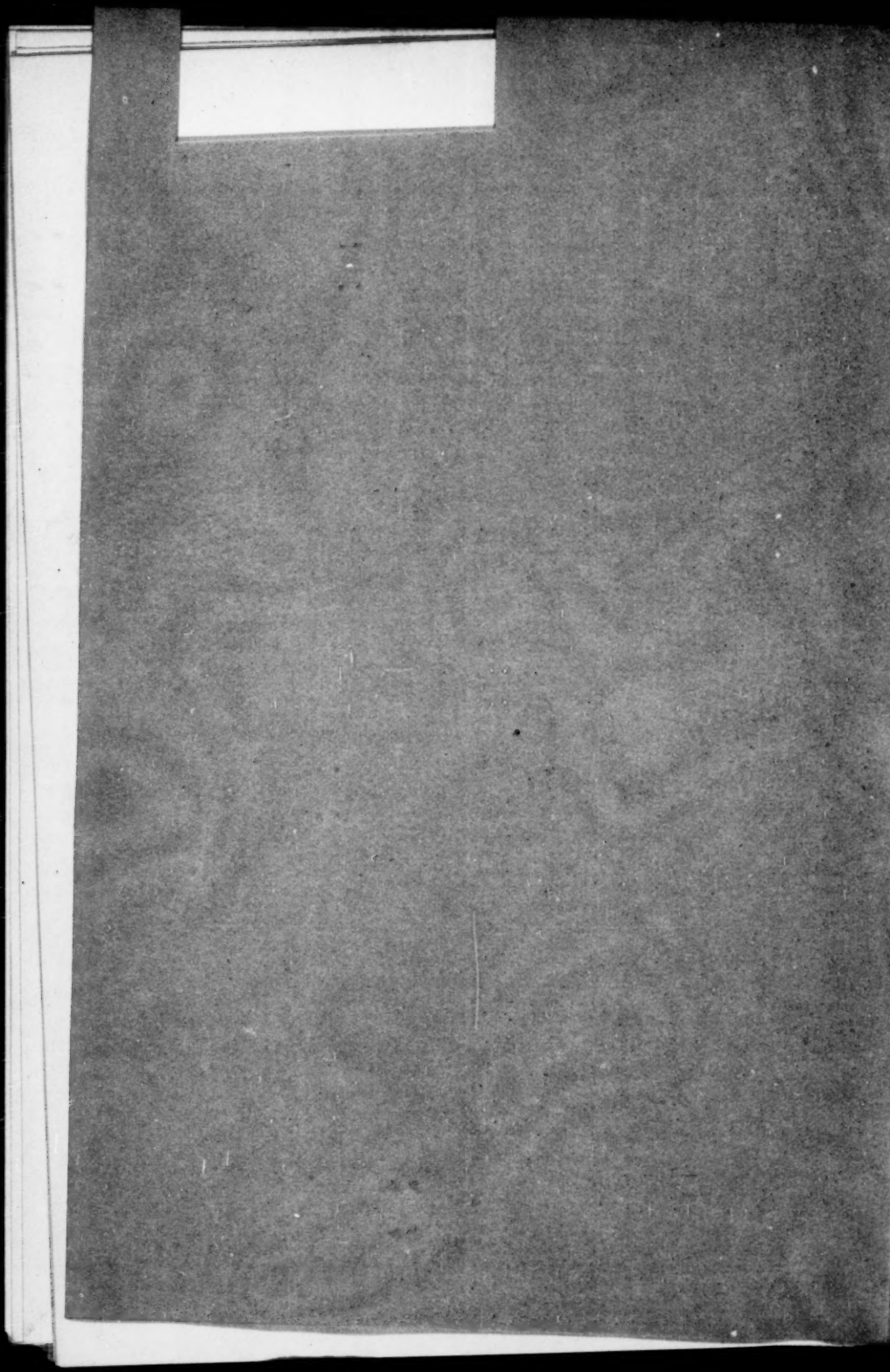
Supreme Court of the U. S.

OCTOBER TERM, 1881.

EX-PARTE THE STATE OF ALABAMA
AND
EX-PARTE ROWLAND ET AL.

SUPPLEMENTAL BRIEF FOR U.S. MARSHAL.

SAMUEL F. RICE,
A. A. WILEY,
For U. S. Marshal.



Supreme Court of the U. S.

OCTOBER TERM, 1881.

EX-PARTE THE STATE OF ALABAMA)

AND

EX-PARTE ROWLAND ET AL.)

Supplemental Brief for U. S. Marshal.

The Circuit Courts of the United States are courts to which the following general rule applies: "that every presumption not inconsistent with the record, is to be indulged in favor of their jurisdiction; and their judgments, however erroneous, cannot be questioned, when introduced collaterally, unless it be shown affirmatively that they had no jurisdiction of the case." Harvey vs. Tyler, 2 Wallace, 341, 342 and cases therein cited, and also cases cited in our original brief on file. Grignon vs. Astor, 2 Howard, 341.

"Whenever it appears that a court possessing *judicial* powers has rightly obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error, or set aside by some *direct proceeding for that purpose.*" Harvey vs. Tyler, 2 Wallace, 342 *et seq.*

"Where a court has jurisdiction, it has *a right to decide every question which occurs in the cause;* and whether its decision be correct or otherwise, its judgment, until re-

versed, is regarded as binding in every other court." Elliott vs. Peirsol, 1 Peters, 340. Grignon vs. Astor, 2 Howard, 319.

In the case last cited, 2 Howard. 338, the definition of jurisdiction which had previously been given by this court is repeated as follows:

"The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurer the court would render a judgment in his favor, it is an undoubted case of jurisdiction: whether on an answer denying and putting in issue the allegations of the petition, the petioner makes out his case, is the exercise of jurisdiction, conferred by the filing of a petition containing all the requisites, and in the manner required by law." 6 Peters, 709. "Any movement by a court is necessarily the exercise of jurisdiction; so, to exercise any judicial power over the subject-matter and the parties, the question is whether, on the case before a court, their action is judicial, or extra-judicial, with, or without the authority of law, to render *a judgment* upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it. 12 Peters, 718; S. P. 3 Peters, 205. It is a case of judicial cognizance, and the proceedings are judicial. 12 Peters, 623.

Under the principles above stated (from which "this court has never departed," 2 Howard, 343), and under the facts set forth in the Marshal's return including the

transcript thereto attached, the following propositions are undeniable:

1. The Circuit Court of the United States for the Middle District of Alabama had jurisdiction of the cause of Dix & Company against Chambers County from its origin or commencement, and of all the "subsequent proceedings" therein, including the final judgment and sentence of that court against the prisoners, rendered November 21st, 1881;

2. That court had jurisdiction to render the judgment in favor of Dix & Company against said county bearing date, May 25, 1875;

3. It had jurisdiction to make the order of November Term, 1875, for the issue of an alternative writ of mandamus;

4. After the alternative writ had issued November 19, 1875, and had been duly served on the prisoners on or before December 2, 1875, and the prisoners had failed to made any answer thereto, that court had jurisdiction to make the order for the peremptory writ of mandamus on December 14, 1875;

5. After the peremptory writ had issued on the 17th day of December, 1875, and had been duly served on the prisoners on the 14th day of February, 1876, and the return thereto had been filed in that court on the 3rd day of May, 1876, that court had jurisdiction on May 23d, 1881, to hear the motion of plaintiffs (Dix & Company) to quash said return to said peremptory writ, and to grant that motion and to render judgment that said return was insufficient and that it be quashed.

6. That court had jurisdiction on December 27, 1881, to enter *nunc pro tunc* on its minutes, its said last mentioned judgment quashing said return; which judgment

when so entered *nunc pro tunc*, (although so entered after the application to this court for the writ of habeas corpus), must be regarded by this and all other courts as if it had been properly entered on the minutes on the day it should have been entered. Dow vs. Whitman, 36 Ala., R. 604, and cases therein cited;

7. After said return had been thus quashed, that court had jurisdiction on the 23d day of May, 1881, to order the issuance of the rule to the prisoners to show cause why an attachment should not issue against them for violating and disobeying said peremptory writ of mandamus;

8. After that rule had been issued, and had been duly served on the prisoners on the 29th day of May, 1881, that court had jurisdiction to overrule their motion on July 16th, 1881, to quash said rule;

9. After the said last mentioned motion of the prisoners had been so overruled, and after their return to that rule had been filed on July 16th, 1881, that court had jurisdiction on that day to consider and adjudge that said last mentioned return was insufficient and that it did not furnish any excuse or exoneration for their failure to obey said peremptory writ, and that they were guilty of contempt of said court in relation to said writ, and to withold or suspend the sentence of the court and *continue this cause* until the then next term of the court, in order that the prisoners might have an opportunity, by performing their plain duty under said Act of 1868, to pay said judgment of Dix & Company against said county, &c.

10. On November 21st, 1881, when, as the record shows, "all the parties this day appeared in this court, and were further heard touching the matters of contempt involved in this proceeding," the said Circuit

Court undoubtedly had jurisdiction to render the judgment and sentence of that date, as it appears in said transcript attached to the Marshal's return, and under and by virtue of which he holds the prisoners in the jail of Montgomery, because they have not paid any of *said fines* or of *the costs of the contempt proceeding.*

As the Circuit Court had the right to decide each and every question which occurred in said cause, and jurisdiction to order and cause the issuance of a mandamus to the prisoners to exercise all the powers conferred, and perform all the duties imposed by said statute of 1868 upon them as members of said Commissioners' Court, and to punish them for contempt in disobeying such mandamus, by fines, and imprisonment until payment of the fines and costs of the contempt proceeding; mere errors or irregularities in the particular mandamus issued, or in the particular sentence imposing such fines and imprisonment cannot be treated, *on habeas corpus*, as either want of jurisdiction, or excess, or abuse of jurisdiction. *On habeas corpus*, error or irregularity in the exercise of jurisdiction, is essentially different in legal effect and result from either want, or excess, or abuse of jurisdiction. If this be not so, then *habeas corpus* may be made to perform the office or function of a writ of error or appeal, contrary to all the authorities.

Courts in their language often fail to keep up the distinction between void and voidable process, as well as between void and voidable judgments. But it is completely settled, that an execution or other like process which is not void but voidable, stands good in favor of the plaintiff, the officer and a purchaser, or to create or preserve *a lien*, until actually set aside for irregularity. Brown, Toler & Phillips vs. Hurt & Bro., 31 Ala. R., 146,

and authorities therein cited; Cogburn vs. Spence, 15 Ala. R., 549.

When there are irregularities in any final process which may be cured by amendment, it is the duty of the court to make or allow such amendment and not to quash the process. Thompson vs. Bondurant, *et al.*, 15 Ala. R. 346; Cawthorn vs. Knight, 11 Ala. R., 579; Sheppard vs. Melloy, 12 *ib*, 561; and authorities cited in the several cases.

No motion to quash the peremptory writ for irregularity of any kind appears. Such a motion, if made, could not have prevailed. High's Ex. Leg. Remedies, Section 552. Every defect in it which is alleged, could have been cured by amendment, and from matter of record at and from the time it was awarded. See cases last above cited.

Where the facts appear of record which entitle the plaintiff to an order for, and the issue of, such a peremptory mandamus as was issued in this cause, that mandamus is not void and will, until set aside, be held good in a subsequent proceeding *for contempt in disobeying it*, even if the order for it had not been actually made. *Ex parte*, Stickney, 40 Ala. R., 160; Ragland vs. King's Adm'r, 37 Ala. R., 80; Gray's Adm'r vs. Cruise, 36 Ala. R., 559; High's Ex Leg., Rem., § 552, *et seq.*

In *Ex parte* Seibold, 100 U. S. Rep., 375, this court referred to the two cases of *Ex parte* Lange, 18 Wallace, 163, and *Ex parte* Parks, 93 U. S. Rep., 18; as well illustrating "the distinction between an erroneous judgment and one that is illegal and void;" and said: "In the former case, we held the judgment was void, and released the petitioner accordingly; in the latter, we held that the judgment, whether erroneous or not, was not void

because the court had *jurisdiction of the cause*; and we refused to interfere."

On such an application as the present, for *habeas corpus*, the question is not whether the particular order for the mandamus, or the particular mandamus itself, or the particular sentence complained of, is erroneous or voidable, but is, *whether the court had jurisdiction of the cause*, or *jurisdiction to order a mandamus* to enforce the payment of its judgment previously rendered in the cause, or *jurisdiction* to convict each of the prisoners of contempt for disobeying such a mandamus and to sentence each to pay a fine of $1,088, and the costs of the contempt proceeding, and to be imprisoned until the same was paid.

The sentence here imposes no imprisonment except such as may result from the choice of the prisoners *not* to pay the fines imposed. Prompt payment of the fines and costs of the contempt proceeding, would have prevented any imprisonment whatever under the sentence. Their imprisonment may be terminated at any moment by the mere act of the prisoners in paying only the fines and costs of the contempt proceeding.

To relieve these prisoners upon the matters shown in the Marshalls' return, is virtually to deny the power in the Circuit Courts of the United States to punish for contempt in disobeying its final process issued to enforce payment of judgments previously rendered by them, on contracts inviolable under the Supreme law. If these courts have not such power, how can it be claimed that any courts of the United States has such powers? This power in all the Federal courts is clearly recognized, declared, and continued in force, by Section 725 of the Revised Statutes. *In re* Chiles, 22 Wallace.

So far we have argued the cause as if there were errors or irregularities in the proceedings of the said Circuit Court. But we now proceed to show that in those proceedings there is no error or irregularity, which could be available to the prisoners, even if they had the right, directly to assail them for error or irregularity.

The most material provisions of said statute of 1868, which form part and parcel of the coupons upon which Dix & Company recovered their original judgment, are as follows:

"SEC. 7. *Be it further enacted*, That the court of county commissioners of said counties in which the electors shall have voted in favor of said subscription, are hereby authorized and required to levy and assess in the same manner as is now required by law for the collection of state and county taxes, such tax as may be necessary to meet the interest falling due semi-annually on said bonds, and other such reasonable amount, to be determined by said court, as will pay the expenses of assessing and collecting said tax and for issuing said bonds; *Provided*, That in no case shall such tax exceed one per cent. per annum upon the value of the real and personal property in said county, as yearly assessed and returned to the proper officers.

"SEC. 8. *Be it further enacted*, That the courts of county commissioners in the various counties in which such subscriptions shall have been made, as hereinbefore provided, are hereby authorized and required to require the tax-assessors and tax-collectors to assess and collect said tax. Then said courts of county commissioners shall be, and they are hereby, invested with all the powers, privileges, and rights, and bound by the same duty of proceeding against said tax-collectors and tax-assessors, and their sureties, as are vested in, granted to, and imposed upon the auditor of public accounts by law, for the amount of said taxes not assessed, collected, and paid over, or misapplied.

"SEC. 9. *Be it further enacted*, That the tax-assessors and collectors in the various counties which shall have voted for subscription, as hereinbefore provided, are

hereby invested and empowered with all the rights and remedies for collecting said tax as are now provided by law for the collection of state and county taxes, and be bound by the same duties, and that the same pains and penalties as are now prescribed by law shall attach to all persons for failing to render a tax-list or for rendering a false list.

"SEC. 12. *Be it further enacted*, That the courts of county commissioners of the various counties are hereby vested with power to do any and all acts to carry out all the provisions of this act, which are not inconsistent with the act itself, and the laws of the state and the United States."

The power conferred by this statute on the court of county commissioners, is not *judicial*. As to that, these commissioners are called a court "merely as a designation of the persons to whom the authority is confided." United States vs. Ferreira, 13 Howard, 47; but they are not State judges clothed with judicial power as to the levy and collection of the tax. Commissioners' Court vs. Moore, 53 Ala. R., 25. This county court is like the county court of Kentucky mentioned in Harvey vs. Tyler, 2 Wallace, 341. Although it has a discretion, its power, in this respect, is given by statute, is not judicial, is in its nature ministerial; People vs. Walter, 68 N. Y. Rep., 410; and the members of such a court, as to this statute power (*quoad hoc*), is amendable to the process of mandamus. Commissioners' Court of Limestone county, vs. Rather, 48 Ala. R., 433; Tenn. & Coosa R. R. Co. vs. Moore, 36 Ala. R., 371.

There is nothing in the relation of the State and the national sovereignties to preclude the co-operation of both in the matter of enforcing State statutes like said act of 1868, which form part and parcel of the obligation of contracts, when such contracts are properly sued on in a Federal Circuit Court. *If both were equal in authority*

over the subject, collisions of jurisdiction might ensue; but *the authority of the National government being paramount*, collision can only occur from unfounded jealousy of each other. *Ex parte* Siebold, 100 U. S. Rep., 372; Riggs vs. Johnson county, and other cases cited, *supra*.

In Commissioner's Court of Limestone County vs. Rather, 48 Ala., R. 433, it was decided, that when such Commissioner's Court refused to levy and assess a tax authorized by such a statute as the aforesaid Act of 1868, to pay such coupons as those upon which the judgment of Dix & Company is founded, mandamus is the appropriate remedy even as an original suit, to enforce the payment of such coupons; that such failure or refusal of such commissioners to levy, assess and collect such tax, for more than ten years did not limit or destroy their power to levy and collect such tax, but that their power to levy and collect the same "existed as long as the legal obligation to pay the debt subsisted," and of course might be exercised *nunc pro tunc*.

That case, and the like case of Shinbone vs. Randolph County, 56 Ala., R. 183; was cited and approved in County of Greene vs. Daniel, 102, U. S. Rep. 193.

The manner in which state and county taxes were required to be assessed and collected, is shown in the Act entitled, "An Act to establish revenue laws for the State of Alabama" approved December 31st, 1868. Pamphlet Acts of Alabama of 1868, pages 297–339. That Act is too long to be inserted in this brief, and it is unnecessary to insert the whole of it. Its most material provisions so far as they concern the present cause, may be sufficiently understood from the following summary:

SEC. 37 provides that the assessor shall return and deliver an Assessment Book "to the probate judge of

the county by the first Monday of July of each year," "which book shall show, in separate columns, the names of persons assessed in each precinct, in alphabetical order, the number of acres of land assessed to each person, the value of the same, together with any other real estate, the number, amount or value of any species of taxable property, and the whole number, amount and value of each separate item entered therein, and the total amount of the assessment for the county."

SEC. 97 constitutes "a Board of Equalization" of which the probate judge, and county commissioners, and the county treasurer, and the circuit clerk, are the members; "whose duty it shall be to examine the assessment book as returned by the assessor," the probate judge being chairman of that Board.

SECS. 99 and 100 authorize said Board to equalize and correct the assessment appearing in said book.

SEC. 101 provides that "after the assessment shall have been equalized and the corrections made as provided in the two last preceding sections, it shall be the duty of the chairman of the Board to make and sign a certificate upon, or appended to the assessor's book, which certificate may be in the following form;" and the form is set forth in section 101.

SEC. 102 provides that "it shall be the duty of the chairman of the Board of Equalization to make out and forward ☞to the Auditor of the State,☜ within five days after the adjournment of the Board of Equalization, a complete abstract of the assessment of all real and personal property in his county, showing the total amount and value of each class of taxable property contained therein, extended into a column, and the total amount of such sums so extended."

SEC. 103 provides that "it shall be the duty of the court of county commissioners, immediately after the adjournment of the Board of Equalization, to proceed to levy the amount of taxes required for their county for that year, not to exceed the rate levied by the State."

SEC. 104 provides that "it shall be the duty of the probate judge and assessor in each county, during the August term of the Commissioner's Court each year, to destroy all the tax-lists prior to the assessment lists of the last two years preceding, and the books of assessment for previous years shall hereafter be deemed evidence of the contents of such lists."

Section 120 provides "that the Auditor of State shall, from time to time, prescribe such forms and give such instructions as he may deem necessary to carry into effect the provisions of this act, and decide all questions which may arise as to the true construction of this act, or in relation to the duty of any officer under this act; and the instructions thus given shall be obeyed by, and the decisions thus made shall be binding upon all county and municipal officers."

Section 52 provides, "that during the first week of January of each year, the tax collector shall account to the Auditor, under oath, for the whole amount of State taxes by him collected up to that date, first deducting the commissions and fees allowed him by the law, and the Auditor shall charge him with the ten per cent. penalty on all delinquent taxes; and on or before the first day of April following, he shall make a final settlement with the Auditor, and pay over to the Treasurer the balance of the taxes due from the tax payers in his county; and he shall also account to the Auditor, and

pay over to the Treasurer all moneys received by him from sales of lands bought in by the State; and he shall make a final settlement with the county treasurer for all the county taxes on or before the first day of April in each year."

The aforementioned revenue law of 1868 did not repeal or destroy any remedy previously given to the Auditor by either common or statute law. It repealed only laws upon the subject of "taxation in this State," and not any law upon the subject of remedies. Mulvey vs. The State, 43 Ala. R., 316; Horton vs. Mobile School Com'rs, *ib*, 598.

The Auditor (formerly called Comptroller), being the officer to whom the tax collector was bound to account and with whom he was bound to settle, was, by the principles of the common law, entitled to enforce the performance of these duties of the tax collector, by mandamus; Comissioners' Court of Limestone county vs. Rather, 48 Ala. R., 433; and, under Alabama statutes, the Auditor was also entitled to sue the collector and his sureties, for breach of the condition of his bond. Morrow vs. Wood, 56 Ala. R., 1.

The auditor was entitled to have judgment "summarily rendered" in his favor, against any defaulting tax collector, "for the amount of taxes collected by him, not paid into the treasury, under sections 3059 and 3060 of the Revised Code of Alabama of 1867;—the last of said sections being in the following words: "Against defaulting tax collectors and probate judges, for the amount of taxes collected by them, not paid into the treasury."

But if it were conceded, that by the law of Alabama as it existed before the passage of said act of 1868, the Auditor of Public Accounts (theretofore called Comp-

troller), had no power to proceed against assessors or collectors, as to the ordinary State and county taxes, except for penalties and for moneys collected and not paid over—that concession could not help the prisoners. For, on that hypothesis, it is clear, that the true meaning of sections 8 and 12, of said railroad-bond act of 1868, cannot be less than this; that the Court of County Commissioners should, as to the special tax mentioned in that act, be under the duty of *proceeding* against the assessors and collectors "for the amount of said taxes *not assessed*," also for the amount of said taxes "*not collected and paid over*," and also for the amount of said taxes "misapplied," in the *same summary manner* that the Auditor was then authorized to proceed against defaulting tax collectors for "the amount of taxes collected by them, not paid into the treasury." Revised Code of Ala., of 1867, section 3060.

This construction of said sections 8 and 12 of said act of 1868, is demanded by the following considerations, that these sections are remedial—Morrow vs. Wood, *supra*—that they plainly require of the Commissioners' Court as to said special taxes therein mentioned, the duty of *proceeding* against assessors and collectors for taxes "*not assessed*," and for taxes "*misapplied*," as well as for taxes "collected and not paid over." Said section 8, expressly authorized them to proceed in each of these three specified events; and said section gives the superadded power to do any and all acts, necessary to carry out all the provisions of that act, which are not inconsistent with the act itself. and the laws of the State and the United States.

The prisoners (constituting virtually the Court of County Commissioners of Chambers County), certainly were put under some duty of "proceeding" against the

assessor or collector of that county, by the two plain sentences found in said section 8 and the broad superadded powers found in said section 12; for they certainly were, by those sections, clothed with some of the rights and powers, and charged with some of the duties, which belonged to the Auditor as to the ordinary taxes. It is incredible that nothing of that sort was intended by the said sections 8 and 12.—It is a universal rule that courts will adopt that construction of a statute which allows some meaning, effect, or operation to every sentence, clause and word contained in it, rather than a construction which practically expunges words, clauses or sentences. by treating them as surplusage or as meaningless. Spivey vs. The State, 26 Ala., R. 90, and authorities there cited.

Yet, these prisoners, virtually constituting said County Court, clothed with ample powers and charged with plain duties, as to the interest coupons issued under said Act of 1868, do not even pretend, that they ever did but one solitary act, under that statute. That solitary act was the order made by them on the 24th day of April, 1876.

That order is substantially in the following words and figures:

"On the 17th day of December, 1875, a peremptory mandamus was issued out of the Circuit Court of the United States at Montgomery, Ala., and executed on the Commissioners of said county" (of Chambers). "on the 14th day of February, 1876, at the suit of Dix & Company, commanding the Commissioners' Court of Chamber's County to levy a tax for the purpose of paying a judgment in said court in favor of said Dix & Company against said county, rendered at the May Term, 1875, for the sum of two thousand and forty

dollars and fifty-eight cents, and fifty-one dollars costs, and that they report their action in the premises to the May Term, 1876, of said court. Now, as required by said order, it is ordered that a tax of one-fourth of one per cent. on the value of the real and personal property of Chambers County be levied for the purposes above set forth, and that the tax-collector proceed to collect said tax as required by law."

The first observation upon that order, which is the sole reliance of the prisoners, is, that, even if it was a lawful or valid order, it was only the first step towards a valid assessment, under the laws of Alabama hereinabove stated and referred to; and that under said order alone, without any further step or action by said Commissioners' Court, the tax-collector of the county was not authorized to collect the tax so vaguely referred to in that order, and could not, under that order alone, have incurred any default for which either he or his sureties could have been made liable in any suit.

The next observation is, that said order of said Commissioners' Court was invalid; and for the following, among other reasons:

1. It was void for uncertainty. It did not mention or refer to the Assessment Book for any particular year, or to the real or personal property in said county which had been yearly assessed or returned as taxable in or for any particular year. It excluded or omitted the assessor altogether, and left the tax-collector, as well as the rest of mankind, befogged and confounded on the question, whether the order meant what it said, the "property of Chambers County," or the property of some other person, or the property assessed and returned as taxable in said county in the year 1876, or 1875, or 1874, or some other year. No such vague and indefinate

order can constitute lawful authority to the tax-collector to collect any tax, or put him in default for not acting under it.—Nor can any order of that Commissioners' Court be valid and sufficient under said Act of 1868, unless it designates with reasonable certainty, the real and personal property in said ~~county~~ County, assessed and returned as taxable, in some specified year, as the property upon which it proposes to make a levy and assessment. Ever since the masterly opinion of Chief Justice De Grey, in the Duchess of Kingston's case, it has been settled, "that neither the judgment of a concurrent nor exclusive jurisdiction, is evidence of any matter to be inferred by argument from the judgment." McCravey vs. Remson, 19 Ala., R. 430.

2. Although the recitals in the preamble of the order make a loose and vague reference to the peremptory mandamus, and very inaccurately represent the entire purport of that mandamus to be a command to the Commissioners' Court "to levy a tax for the purpose of paying a judgment in said (Circuit) Court in favor of said Dix & Company against said county," &c., and to "report their action in the premises to the May Term, 1876, of said court,"—yet, such recitals in the preamble can no more control the construction of the body of the order, than the title of an Act of Congress can control the construction of the body of that Act. Hadden vs. The Collector, 5 Wallace, 107.

The body of the order of the Commissioners' Court, in plain and unambiguous words, orders a tax "on the value of the real and personal property of Chambers County," and on nothing else. This order is in contempt and defiance of the said Act of 1868, and of the peremptory mandamus; both of which, in plain words required the levy assessment and collection, in accord-

ance with the provisions of said Act of 1868, of such a tax upon the real and personal property in Chambers County, as would be sufficient to satisfy said judgment founded on said coupons. The order, on its face and upon its own plain words, was unauthorized by law, was void, and could not impose any duty or confer any authority upon the tax-collector.

But the prisoners undertake to make this illegal and void order, a good and valid order by their subsequent statements contained in their return to the peremptory mandamus and in their return to the rule to them to show cause why they should not be punished for contempt in disobeying said mandamus. According to all the authorities, no order entered on the records of any kind of court, which as it appears of record, is void on its face, can become valid by the subsequent statements of the members of the court, not made in their own court nor appearing on its records.

An order of a county court of this sort when entered on its records at a term which had adjourned long before said subsequent statements were made, cannot, after such adjournment, be more controllable by such subsequent statements, than is an ordinary written contract. And yet it is settled, that a contract which the parties intended to make, but did not make, cannot be set up in the place of a contract they did make, but did not intend to make. Sandford vs. Howard, 29 Ala. Rep., 693, and authorities therein cited.

The order as made and entered of record, was either good or bad upon its face, and was not dependent upon any intention of the members of the Commissioners' Court not expressed or disclosed in the order itself. How can a tax-collector be put in default for not acting under an order of this sort void on its face? How can

such an order be supposed to be in compliance with, or in obedience of, such a peremptory mandamus as appears in this case? Whenever it is settled, that such an order will exempt such county officers from the penalties of contempt, the holders of all such coupons as are shown in this case may as well burn up their coupons.

Look at the circumstances under which that order was made. Dix & Company had sued on their unpaid coupons, had obtained judgment, and the issue of a *fieri facias* and a return thereon of no property fonnd, had procured the issue and sevice upon the prisoners of an alternative mandamus; and afterwards, the issue and service of the peremptory mandamus. Soon thereafter the legislature of Alabama passed its act of March 1876, noticed in our former brief, which was plainly designed to hinder or defeat the collection of any such coupons. And afterwards, on April 24, 1876, this Commissioners' Court, "at a regular adjourned term," made their said ingeniously drawn order. How can any court, adhering to settled rules of law, allow these prisoners to say, that their said order does not mean what it plainly says, but does means what it was careful not to say?

It is sheer assumption, to assert that the peremptory writ had no force *after the term to which it was returned*. That writ was issued to enforce duties, which, by the statute creating them, were *continuous*; and the command of that writ remains of force continuously until those duties are performed. Commissioners' Court of Limestone vs. Rather, *supra*.

The sentence here complained of by the prisoners, was under all the facts proved to said Circuit Court and in view of the marked features of their contempt, a mild one. The fines might well have been larger; and im-

prisonment absolute and unconditional, might well have been super-added. The sentence is fully sanctioned, not only by the authorities already cited by us, but by many other cases, some of which are cited in the July number of 1881, of the American Law Register, pages 434–436.

Among these, in the recent case of Hoff vs. The Collector of Jasper county, Missouri, May 19, 1881, before Miller and Krekel, JJ. There, the collector was fined, and all the costs, some $200, was imposed upon him, but he was not imprisoned, "*on* the ground that being out of office, he could not perform its duties, to enforce performance of which imprisonment was the proper remedy." See also, High's Extraordinary Legal Remedies, sections 572, 576, and cases cited in notes to section 575, 576.

With confidence, we submit, that upon a clear comprehension of the real facts of this case, as set forth in the Marshal's return, it will be found that in the proceedings of said Circuit Court, there is not even material error or irregularity, much less want, or excess, or abuse, of jurisdiction.

SAM'L F. RICE,
A. A. WILEY,
Att'ys for U. S. Marshall.

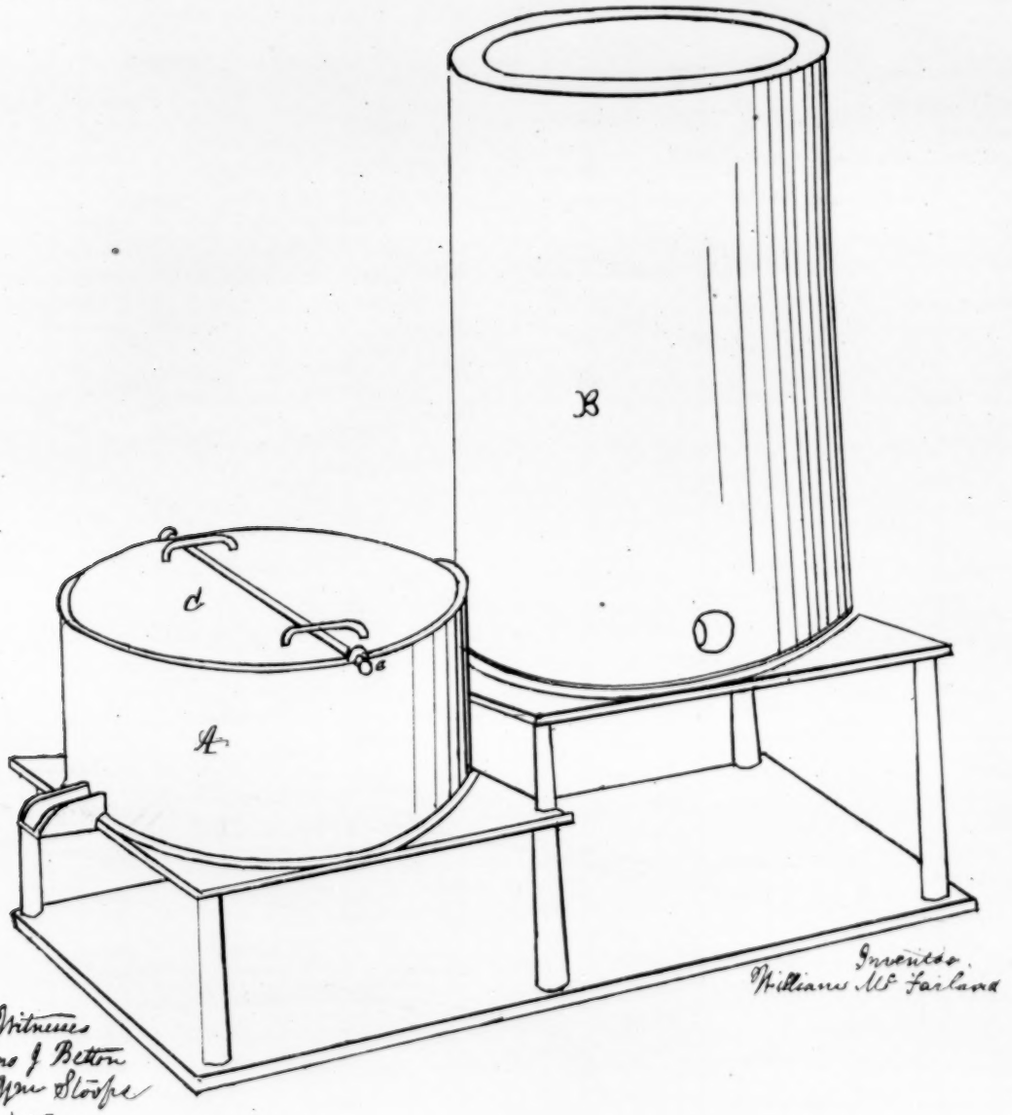
W. McFarland,

Furnace for Melting Iron.

Pat: Dec^r 7 1858

No. 171
Vinton
v.
Hamilton
} Pag^s 1436

N° 22.257



Witnesses
Jno J Bolton
Jno Stoope
427

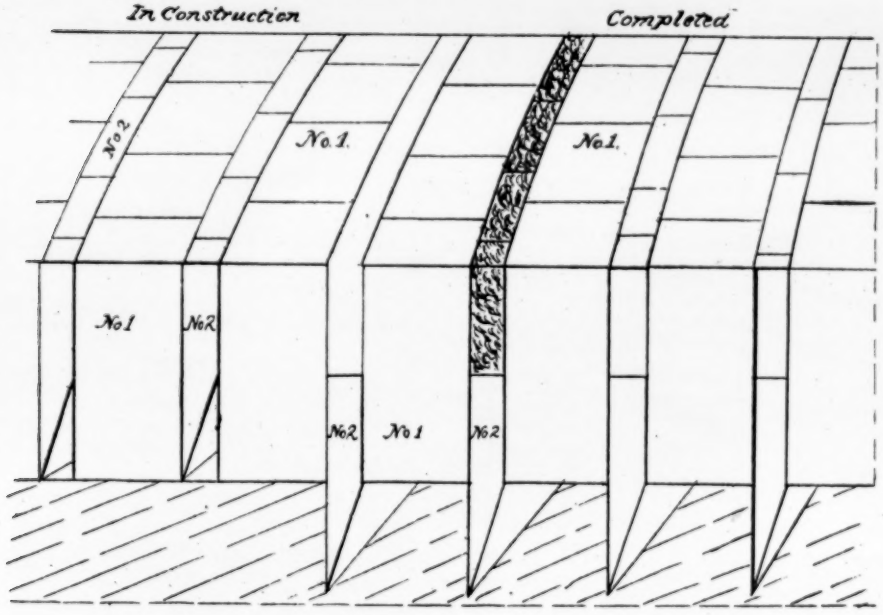
Inventor
William McFarland

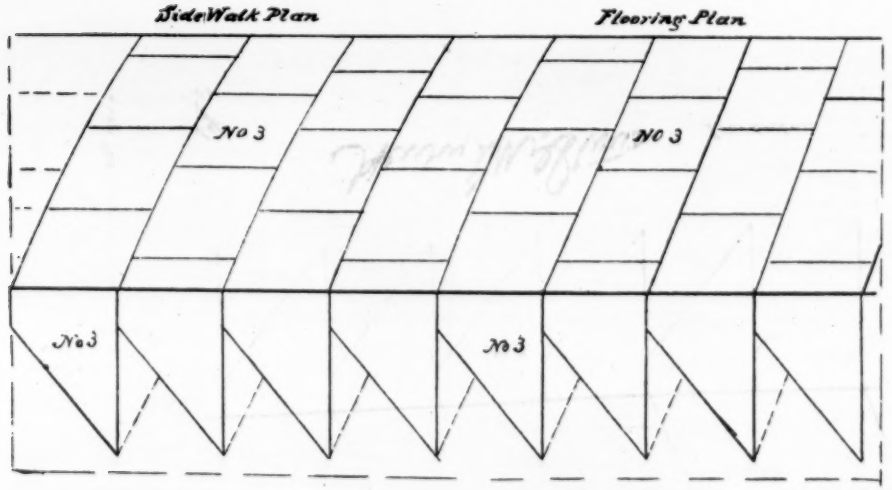
No. 329-
Stow
v.
City of Chicago

Page 39

H. M. Stow,
Wood Pavement.

No. 72110. Patented Dec. 10 1867.





Witnesses:
John R. Brady
Daniel Forhan

Henry M. Stow Inventor.

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Stow
v.
City of Chicago
} Page 45

H. M. Stow.

Street-Pavement.

No. 74862 Patented Feb. 25, 1868.

Fig. 1.

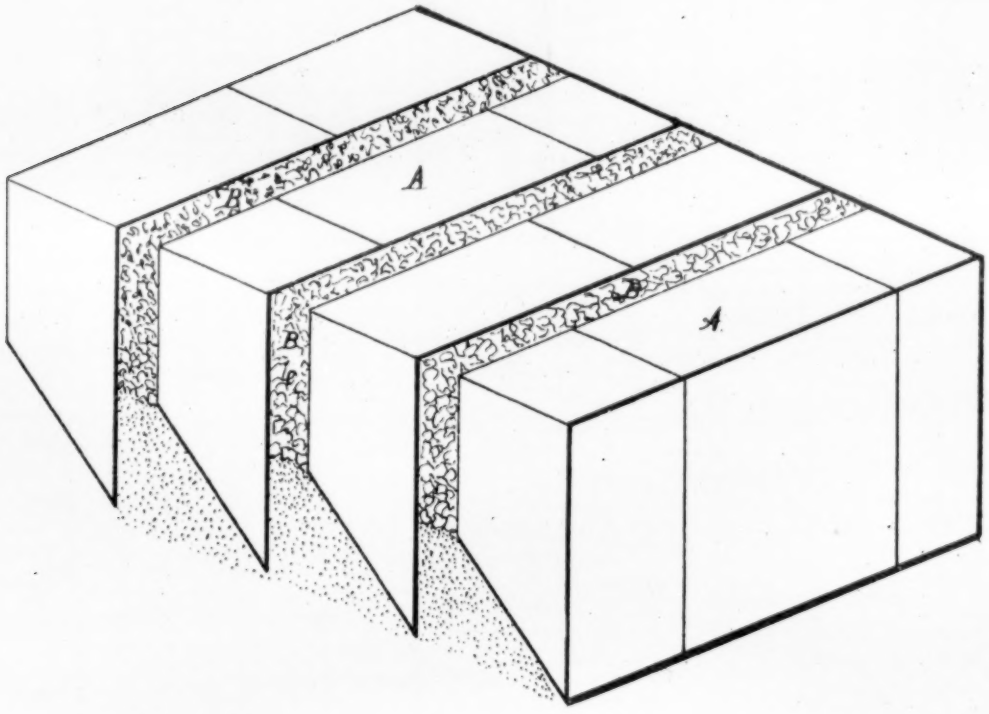
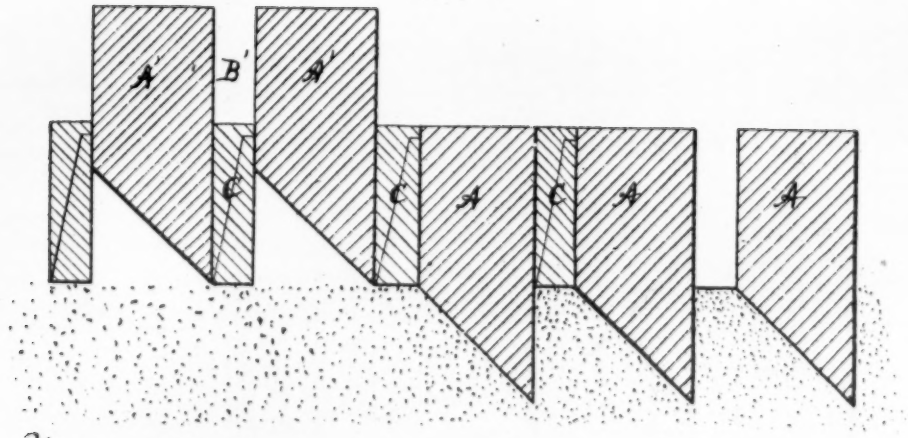


Fig. 2



Witnesses
Jos L Coombs
John O Barclay

Inventor. Henry M. Stow.
By F. J. Coombs
Attorney

No. 329
Stow
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City of Chicago
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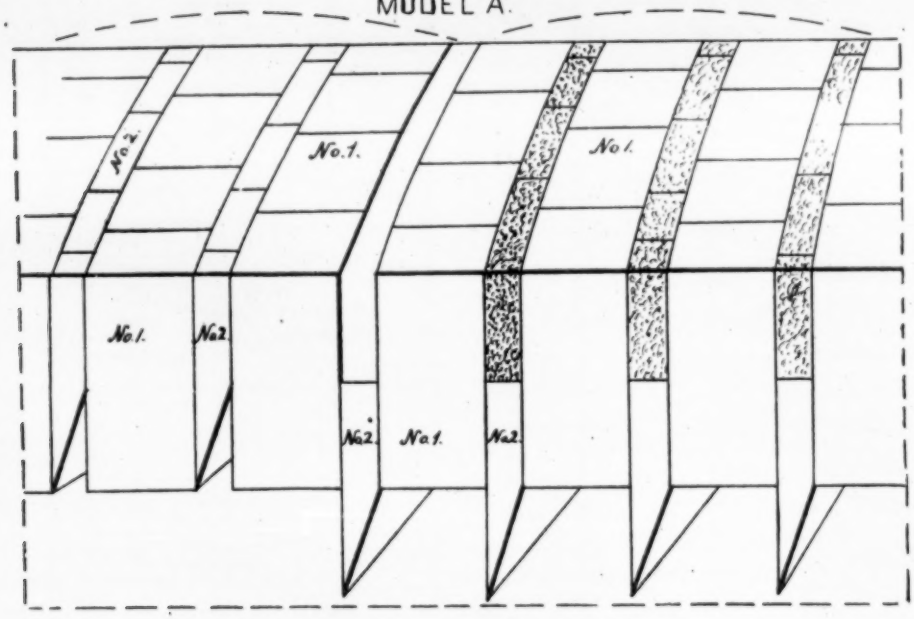
H. M. Stow.
Wood Pavement.

No. 3,274. Reissued Jan. 19, 1869.

MODEL 'A'.



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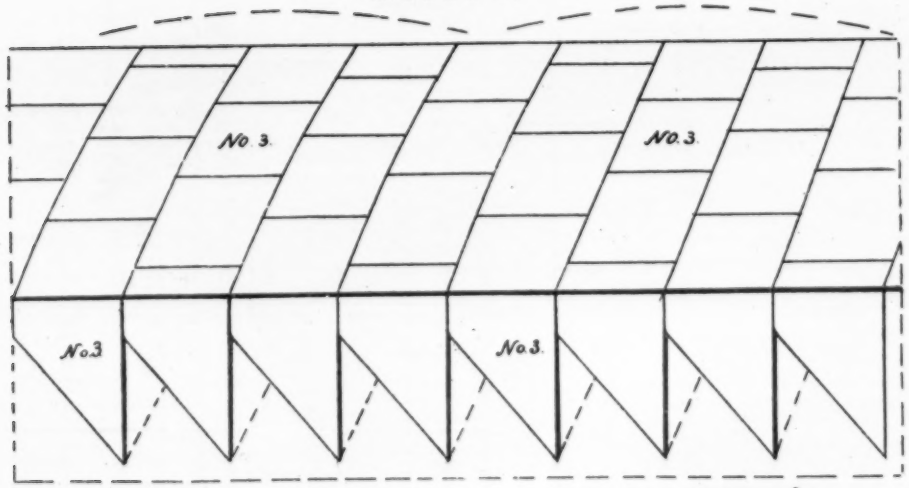

Witnesses.
John P. Brady
Daniel Gorham

Henry M. Stow
Inventor.

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v.
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page 53.

D. L. DeGolyer.

Wood Pavement.

No. 88765 Patented Apr. 6. 1869.

Fig. 1. Top View.

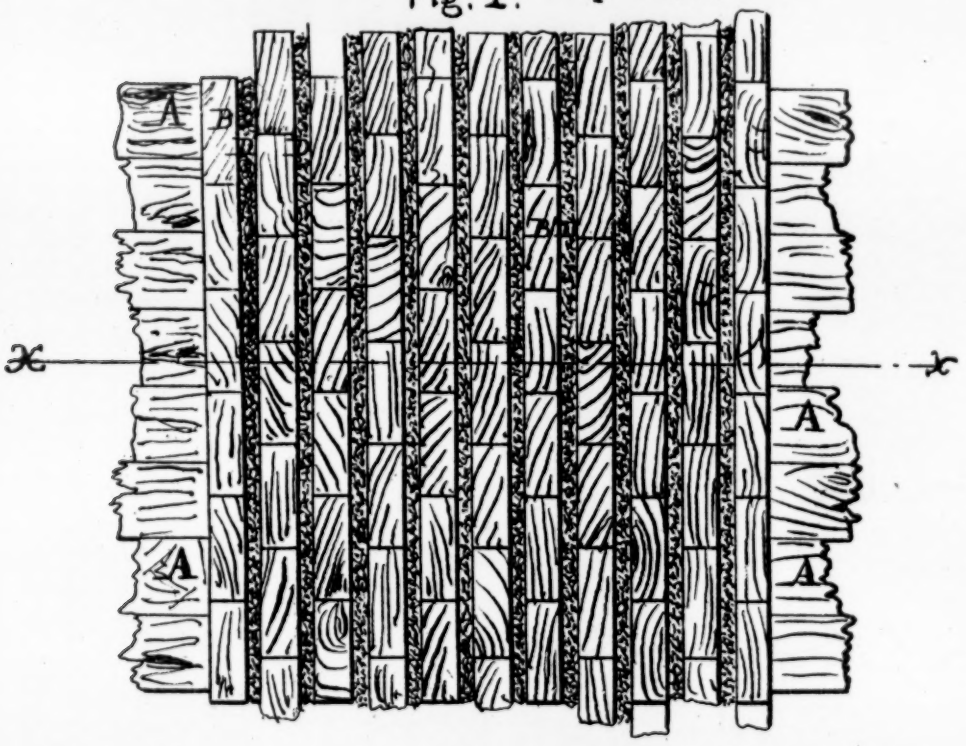
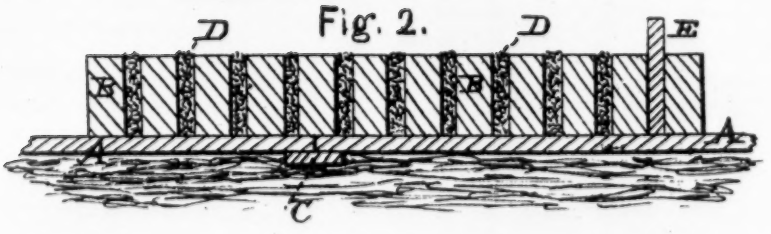


Fig. 2.



Witnesses:

W. B. Munn

L. L. Coombs

Inventor:

David L. DeGolyer

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Stow
v.
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page 60.

H. M. STOW.

Wood-Pavements.

No. 134,404. Patented Dec. 31, 1872.

Fig. 1.

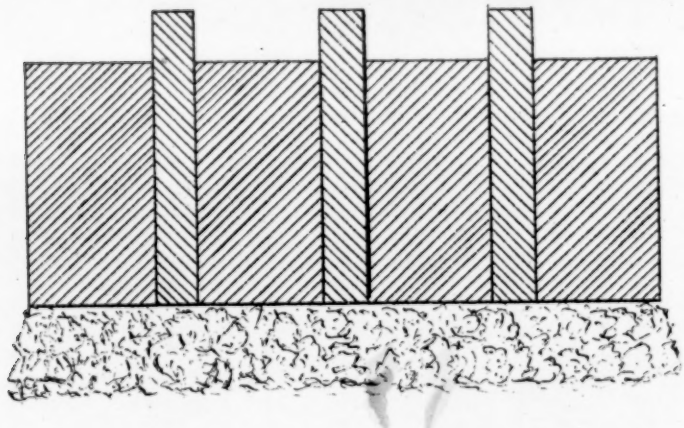
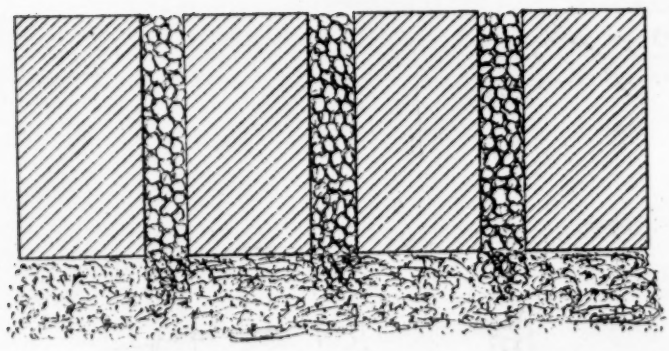


Fig. 2.



Witnesses
D. L. Coombs
Chas L. Coombs

Inventor
Henry M. Stow
By S. L. Coombs,
Attorney.

Thompson 2

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Slow
vs.
City of Chicago
} pag 78.

J. K. Thompson,
Wood Pavement.
No. 100,339. Patented Mar. 1. 1870.

Fig 2.

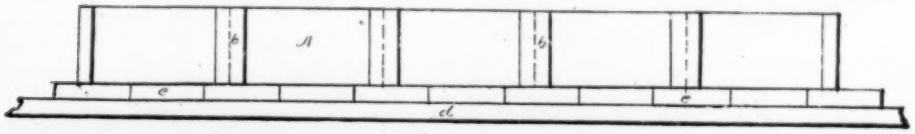
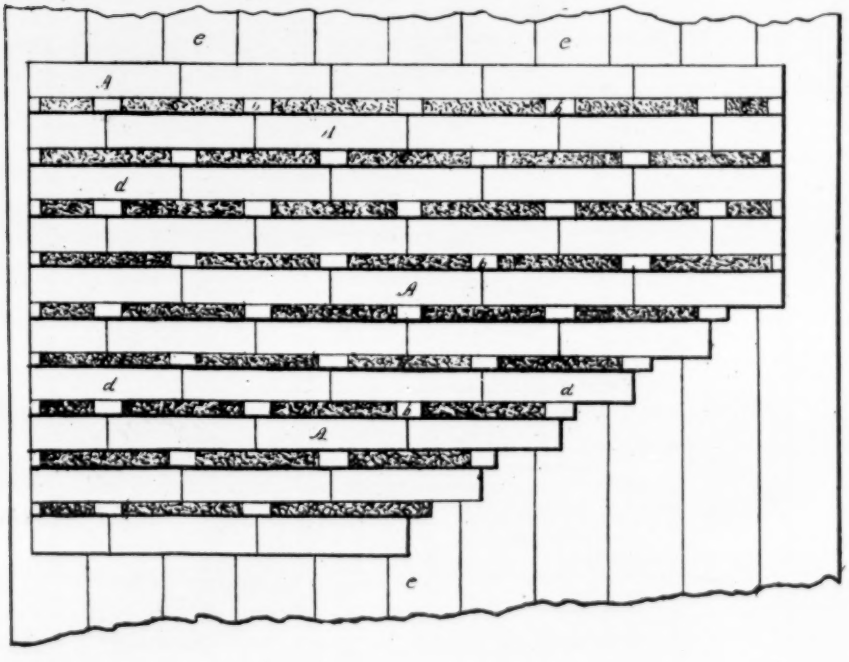


Fig 1



INVENTOR
James K. Thompson
by J. J. Coombs
Atty.

WITNESSES
Edw'd L. Coombs
Jos. L. Coombs

De Golyer & Thompson.

Wood Pavement.

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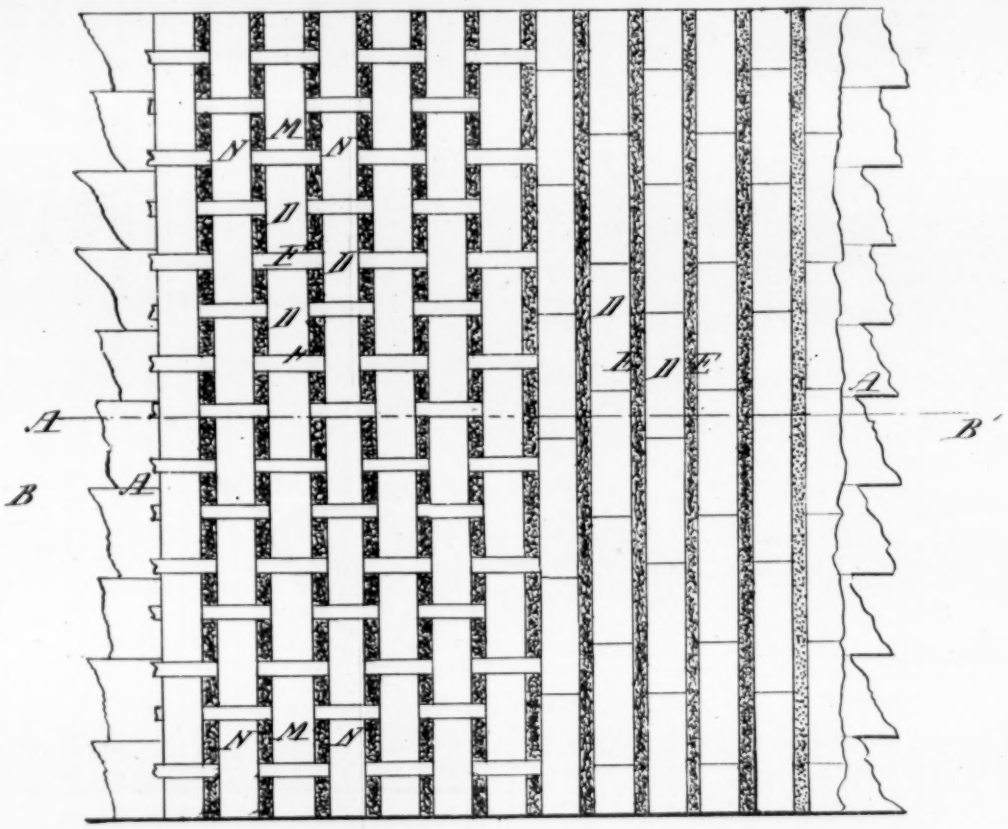
Stow
v.
City of Chicago
} page 84

Filed Jan. 2. 1868.

Fig: 1



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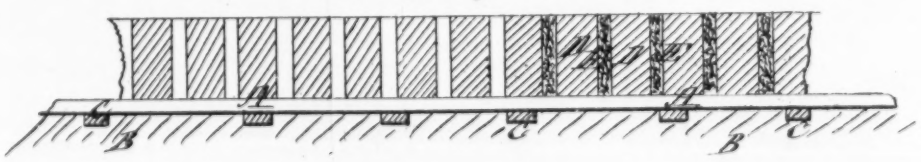

Witnesses
S. H. Lane
J. M. Cutler

Inventor
D. L. De Golyer
J. K. Thompson
by Jo B. Turchin
their attorney

J. K. Thompson.

Wood Pavement.

No. 329
Blow
v.
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Page 89

Filed Nov. 8. 1870.

Fig. 1

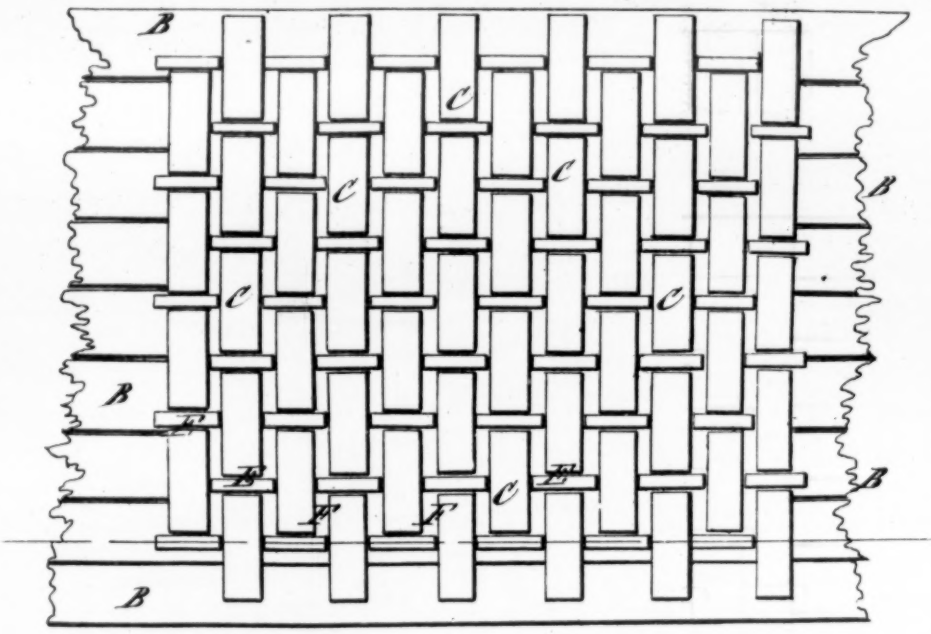
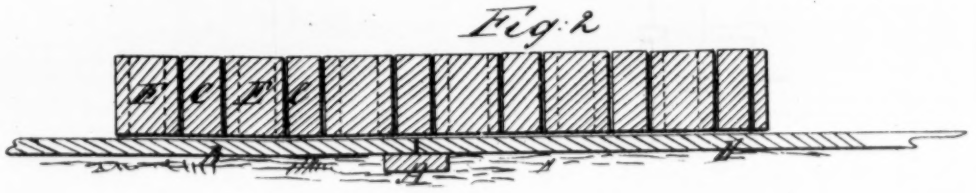


Fig. 2



Witnesses.
E. G. Coburn
Hem.

Inventor
James K. Thompson,
by Lewis L. Coburn,
Atty.

J. K. Thompson

Wood Pavement.

No. 329

Filed Aug. 23. 1870.

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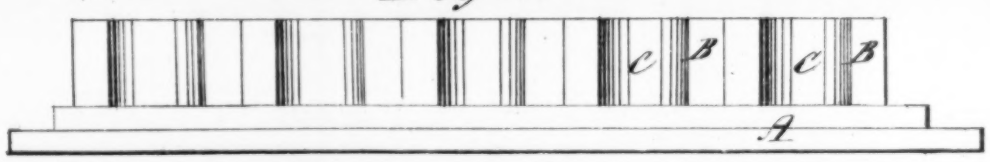
City of Chicago

Fig: 2



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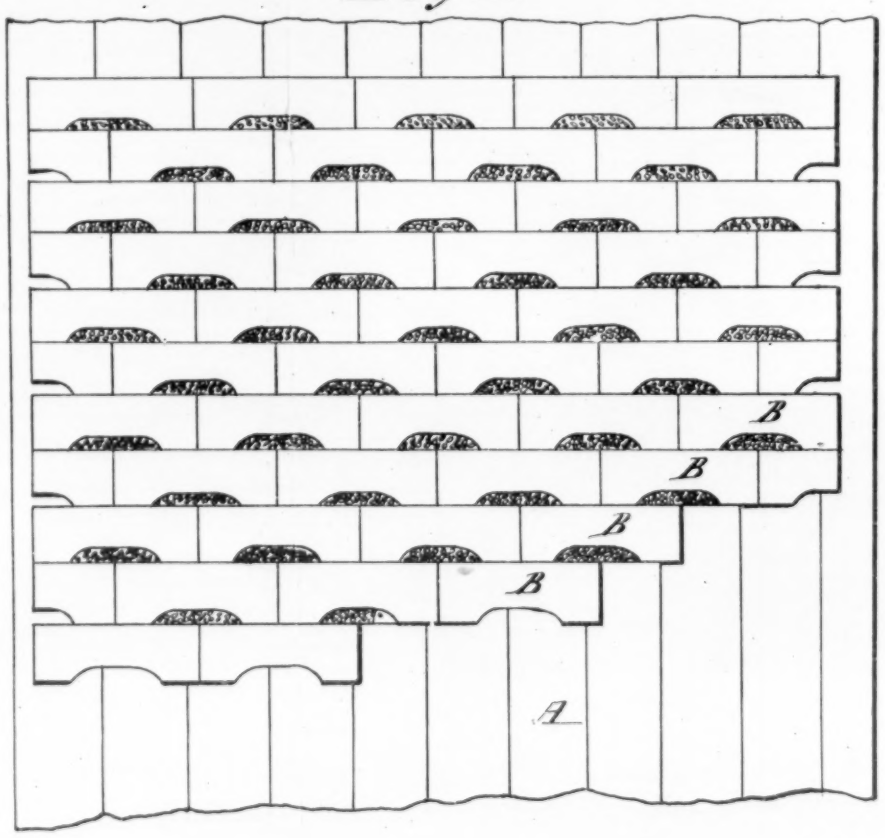
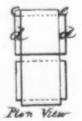


Witnesses
J. J. Munday
I. L. Coburn

Inventor
James K. Thompson
by L. L. Coburn
atty.

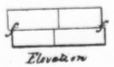
A.D 1839 April 23 N° 8041
STEAD'S SPECIFICATION

FIG 6



Plan View

FIG 7



Elevation

FIG 8.

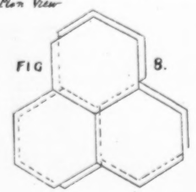


FIG 8
Elevation

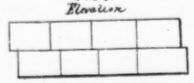


FIG 4.
Plan View.

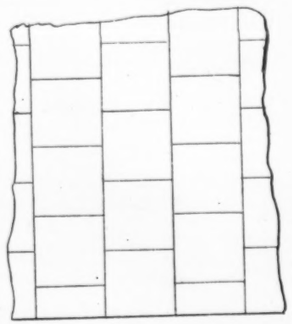


FIG 5
Elevation

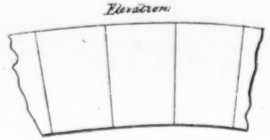


FIG 1

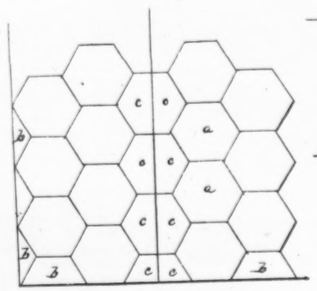


FIG 2
Elevation

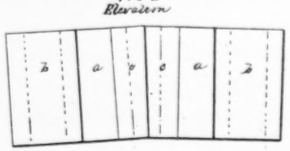


FIG 3

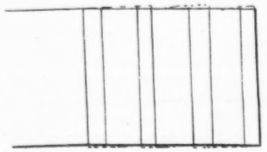


FIG 20

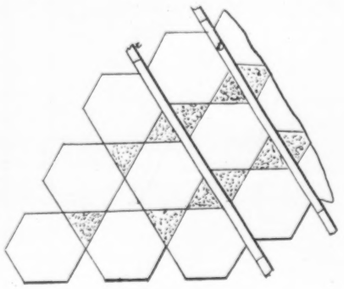


FIG 21
Plan

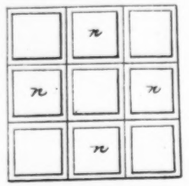
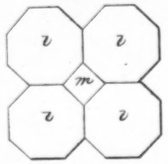


FIG 18
Plan



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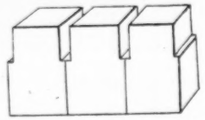


FIG 19
Elevation

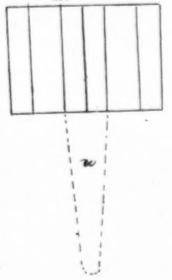


FIG 23

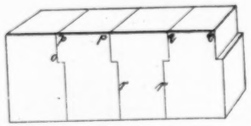


FIG 16
Plan View
Showing the spaces between the Blocks either filled up left open or partly filled up

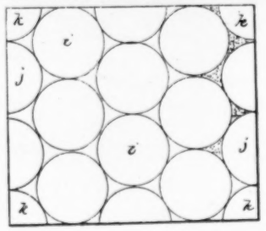


FIG 17

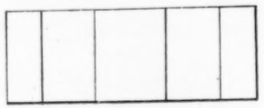


FIG 12
Plan

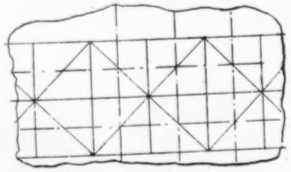


FIG 10
Plan

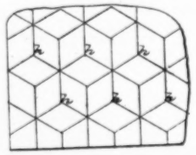


FIG 11
Elevation

FIG 13
Elevation

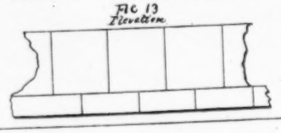
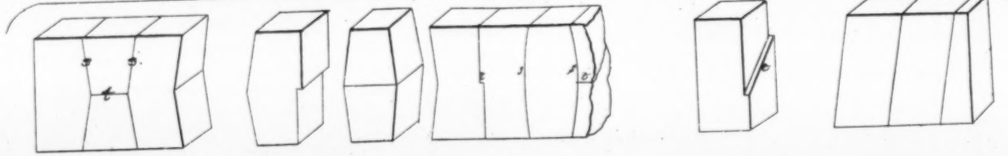


FIG 14
Plan View

FIG 15.

FIG 24.



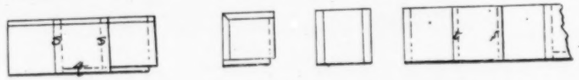


FIG 25 Plan View

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Date of Deposit

A.D. 1840 Oct. 7. N° 8657.

WOOD'S SPECIFICATION.

(1 SHEET)

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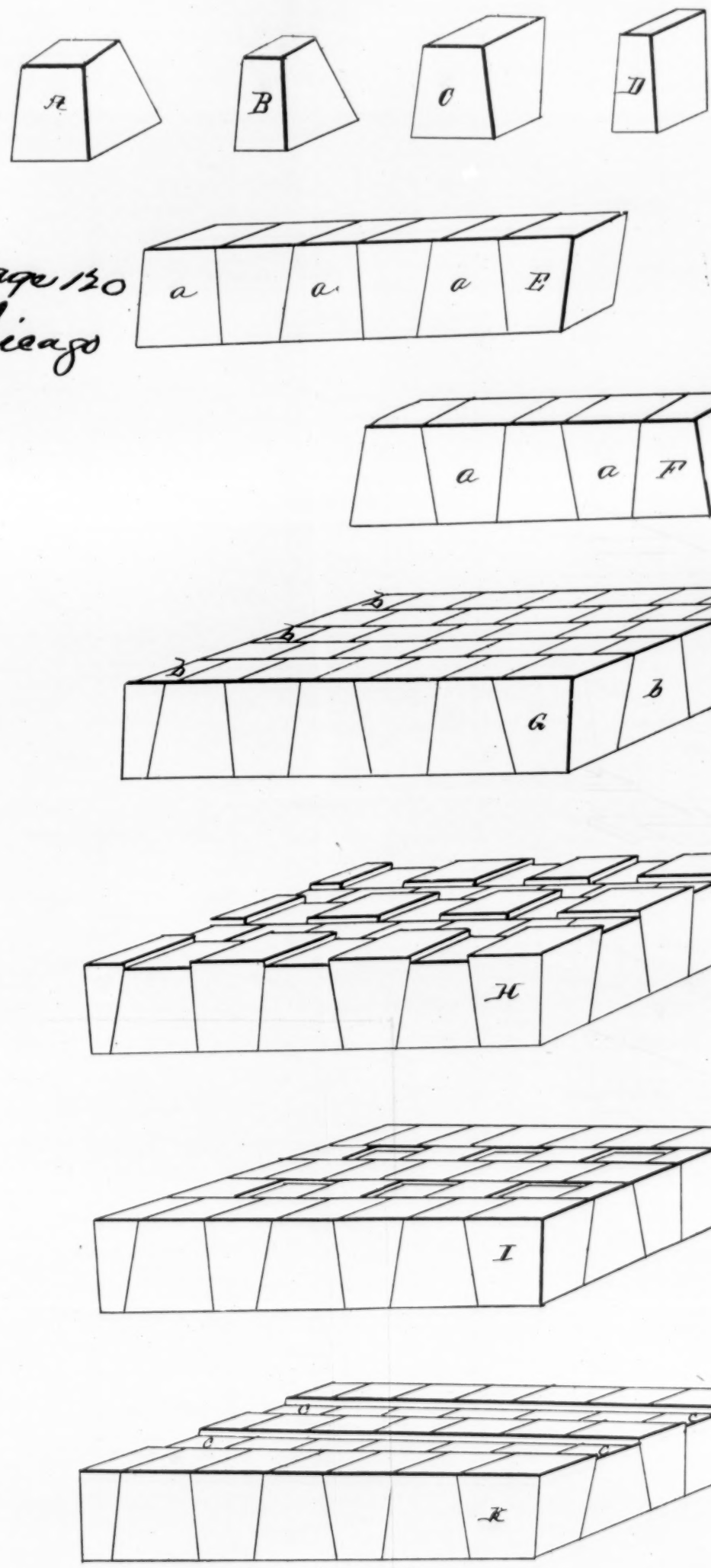

No. 5

H. Mc Dougall.

Wooden Pavement.

No. 75780 Patented Mar. 24, 1868

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Stow
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City of Chicago
} Page 1140

Fig. 1

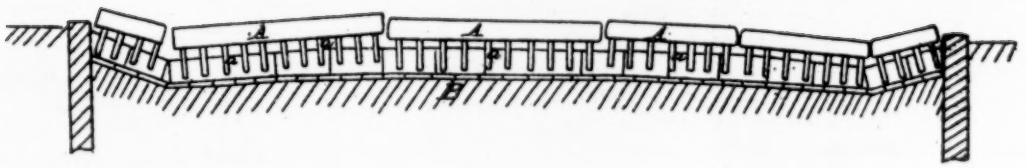
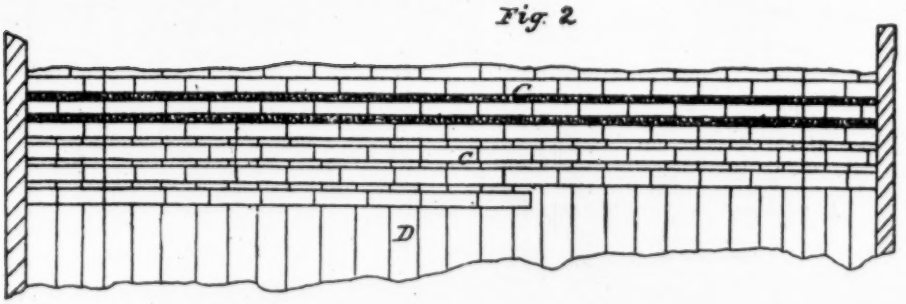


Fig. 2



Witnesses
Jno. Johnson
W. C. Dodge

Inventor
Hugh Mc Dougall
by E. B. Turchin
his Attorney

No 4.

No. 329
Stow
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City of Chicago
page 149

E. Whitehead.

Wood Pavement.

No. 56,303. Patented Jul. 10, 1866.

Fig 1.

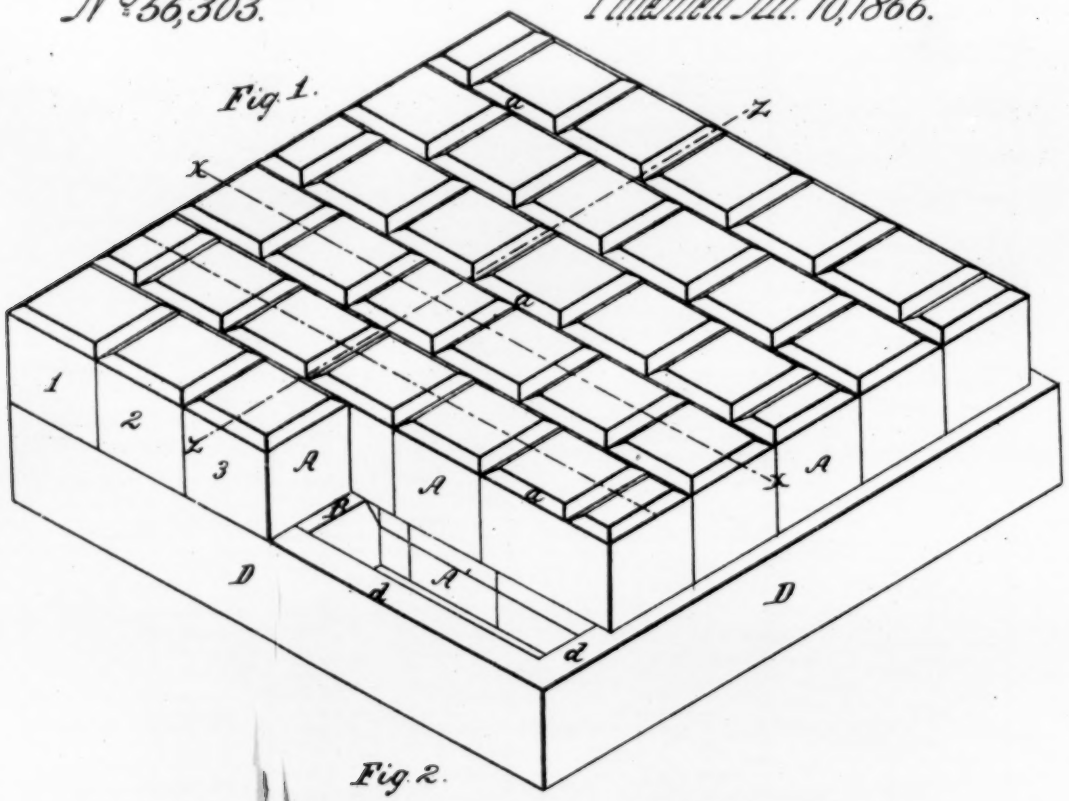


Fig 2.

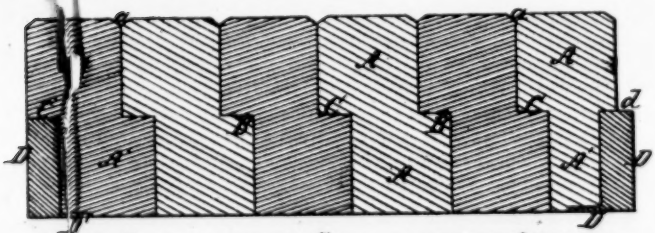
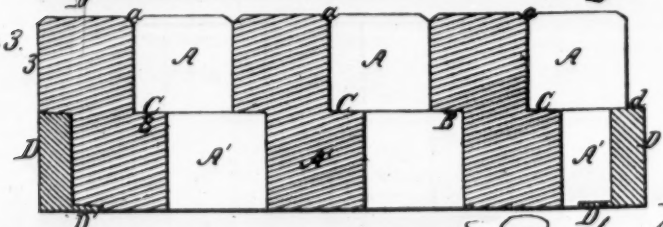


Fig 3.



Witnesses;
James H. Layman.
J. P. Magie

Inventor;
E. Whitehead
J. Byrne Hughes Bros
Attys.

No 8

No. 329
Slow page 151
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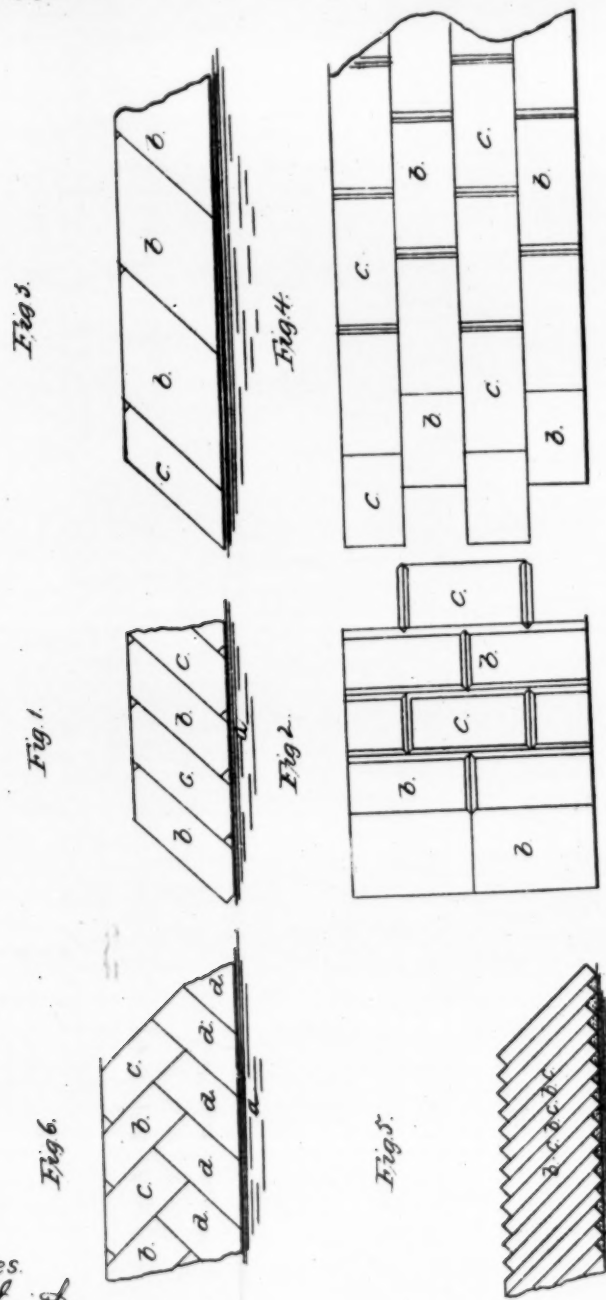
City of Chicago
No 64,186.

B. F. Miller.
Wood Pavement.
Patented Apr. 23, 1867.



Witnesses.
Chas A Smith
Geo T Pinckney

Inventor.
B. F. Miller

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Stow page 153
v.
City of Chicago

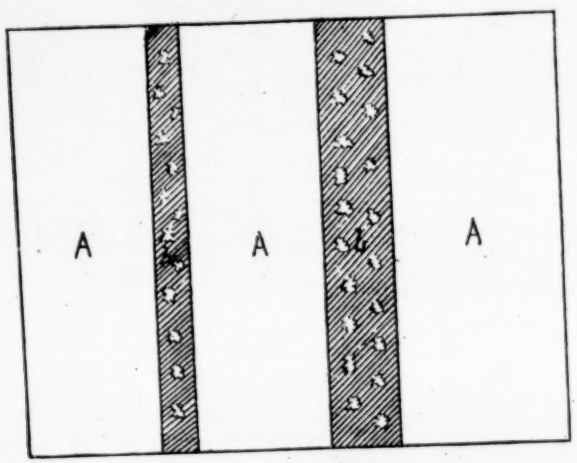
No 9

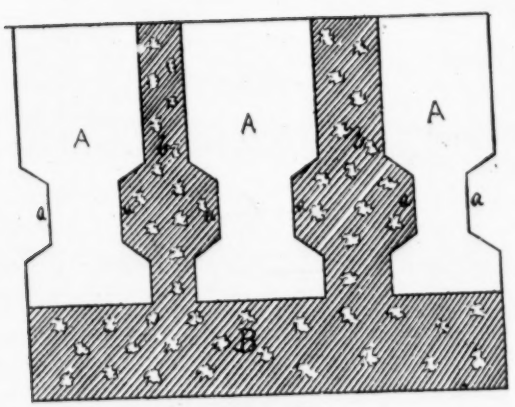
~~2 Sheets Sheet 1~~

Van Camp & Hodgman,
Wood Pavement.

No 96849. Patented Nov. 16 1869

FIG: 1.





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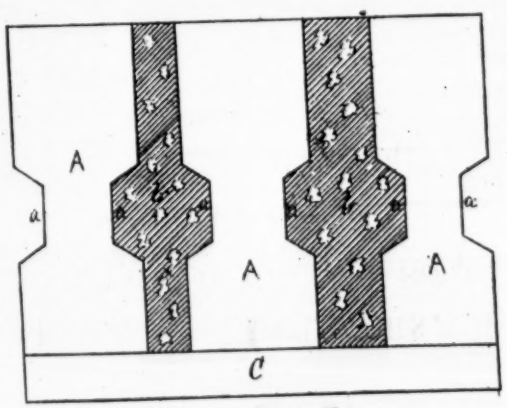

FIG: 3.

WITNESSES.

Edwin James.

Alf: Hobbs 2d Jr

INVENTORS.

A Van Camp and M. M. Hodgman.

per J. E. J. Hotchkiss

Attorney.

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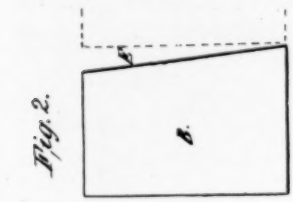
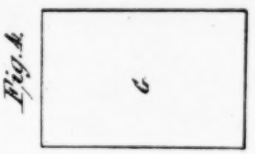
4010

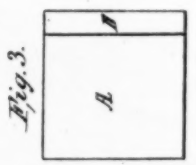
T. Cowing

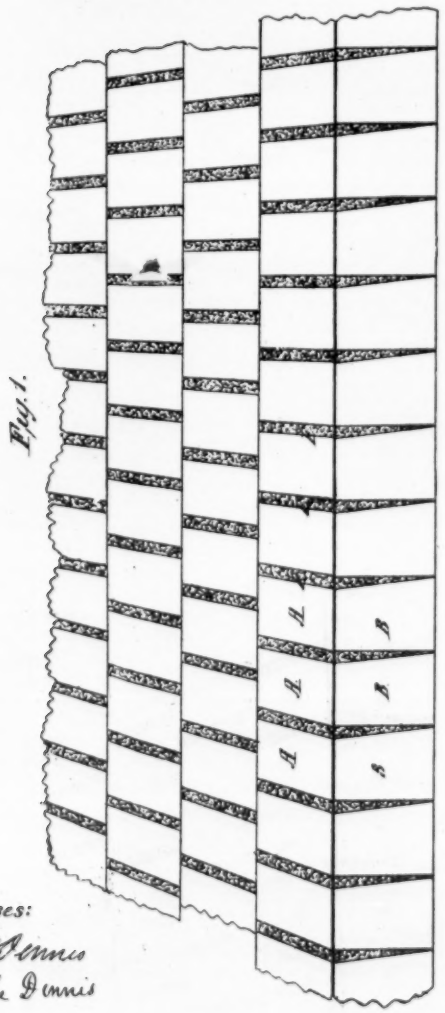
Wood Pavement.

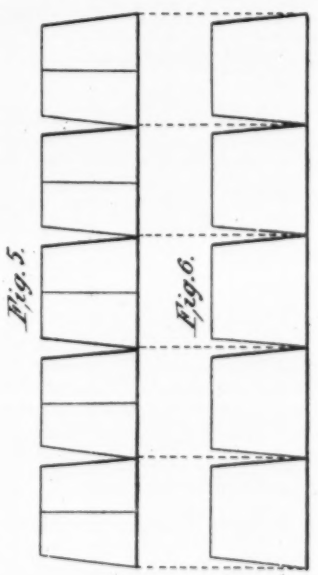
No. 101,590. Patented Apr. 5, 1870.











Witnesses:
Wm. H. Dennis
Wm. H. Dennis

Inventor:
Turner Cowing
By his Atty J. Dennis Jr

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Stow
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No 11

C. Gaytes,

Pile Pavement.

No. 108,582 Patented Oct. 25. 1870.

Fig: 1

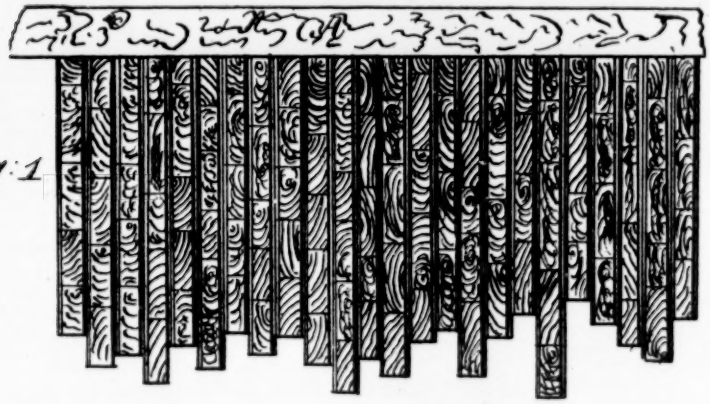
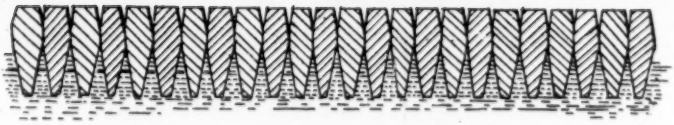


Fig 2.



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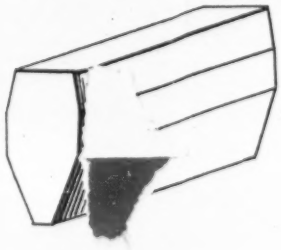
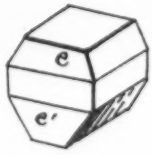


Fig 4.



Witnesses;
James A. Bowlis
Robert Le. Forester

Inventor;
Carl Gaytes

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Blow page 159
& City of Chicago

R. H. WILLET.

Improvement in Wood-Pavements.

No. 114,895. Patented May 16, 1871.

Fig. 1.

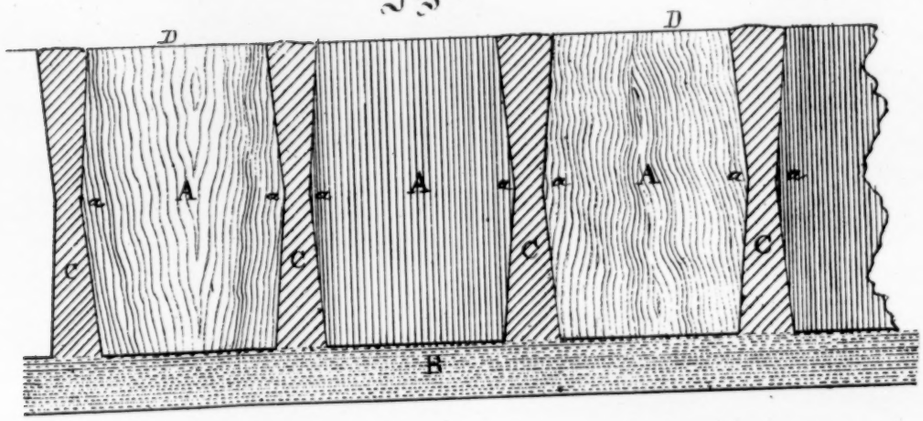
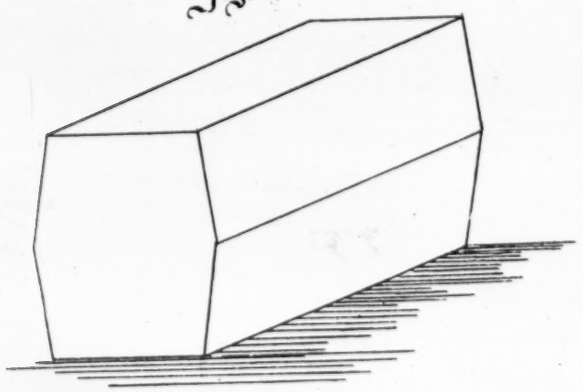


Fig. 2.



Witnesses
C. D. Prelan
W. R. Singleton

Inventor
Richard H. Willet

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S. C. PRESCOTT.

Improvement in Combined Wooden and Concrete Pavement.

No. 116,217 Patented June 20, 1871.

Figure 1.

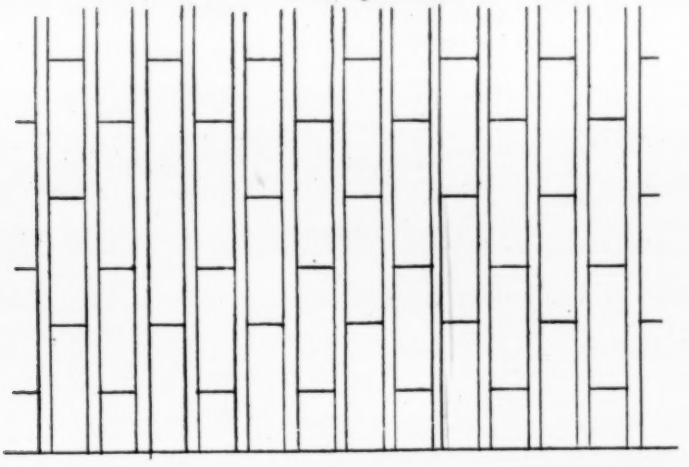


Figure 2.

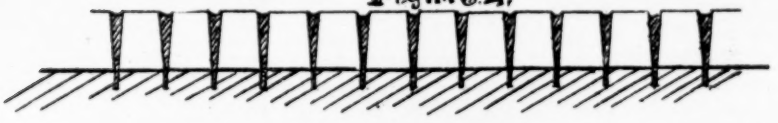


Figure 3.

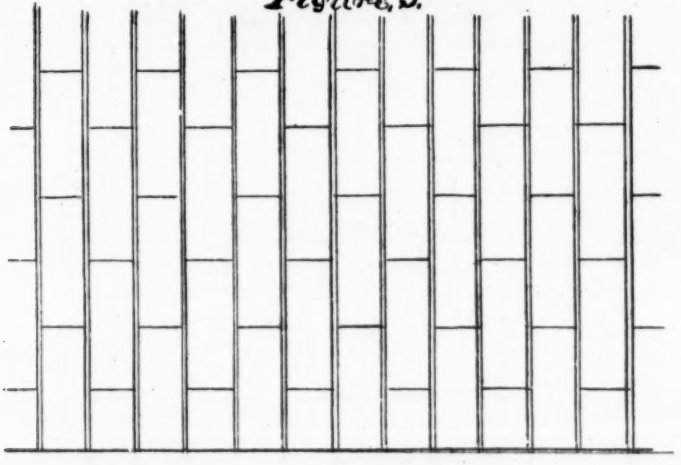
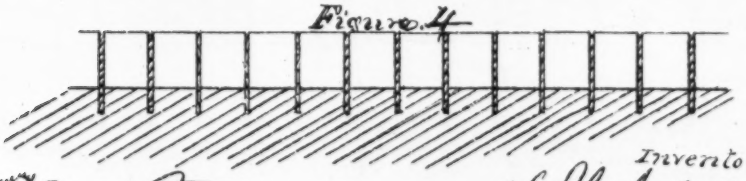


Figure 4.



Witnesses:
W. Hornfager
J. D. Miller

Inventor
Shubael C. Prescott

R. C. Phillips. Wooden Pavement

No. 121,544.

Patented Dec. 5, 1871.

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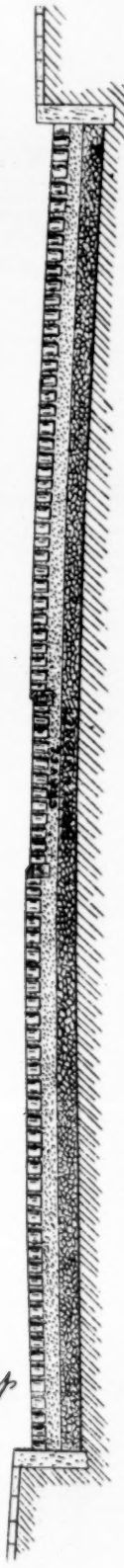

Fig 3.

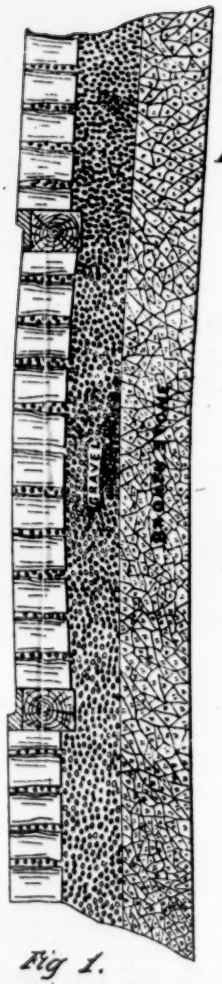

Fig 2.

Fig 1.

R. C. Phillips

Albert E. Tripp
Harry Blackburn

No 15-

No. 329
Slow
& Page 165
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2 Sheets Sheet 1.

G. A. May,

Wood Pavement.

No. 112,945. Patented Mar. 21. 1871.

Fig. 1.

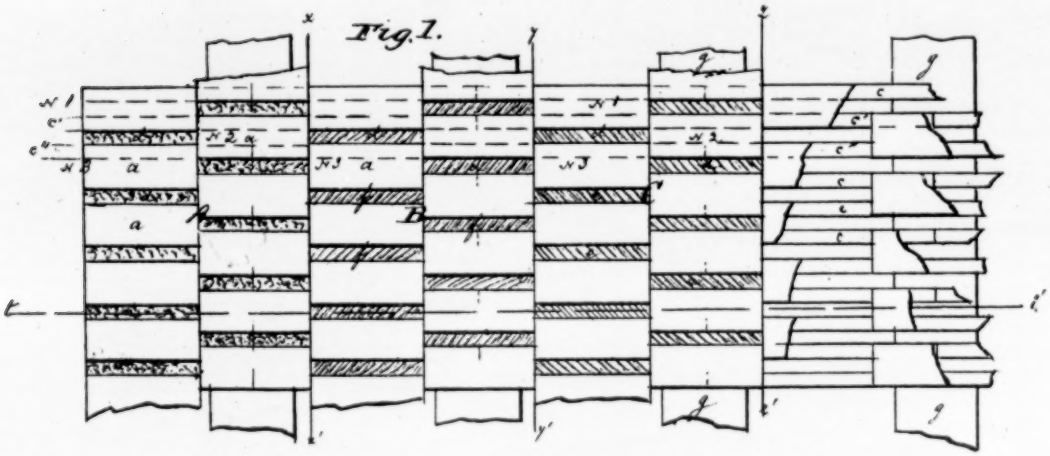


Fig. 2.

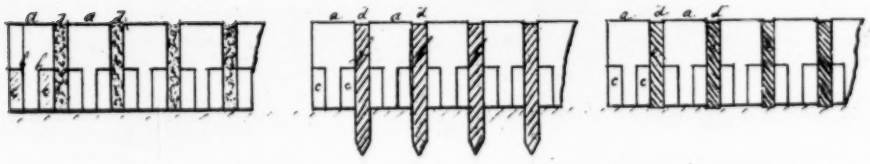
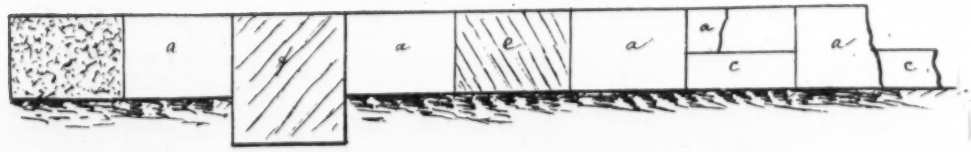


Fig. 3.



Witnesses:
J. B. Turchin
J. H. Cummins

Inventor:
Gordon A. May

No 15

No. 329
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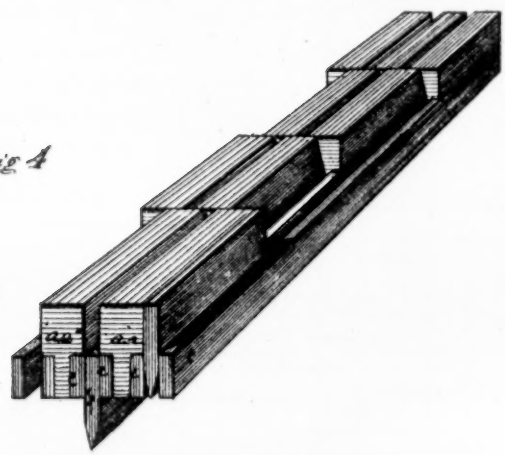
2. Sheets. Sheet. 2.

G. A. May,

Wood Pavement.

No. 112,945. Patented Mar. 21. 1871.

Fig 4



Witnesses

Harry King

Phil. T. Dodge.

Inventor.

Gordon A. May

by Dodge & Munn

his attys.

E. P. MORONG.

Improvement in Wood-Pavements.

No. 132,682. Patented Oct. 29, 1872.

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Fig. 1

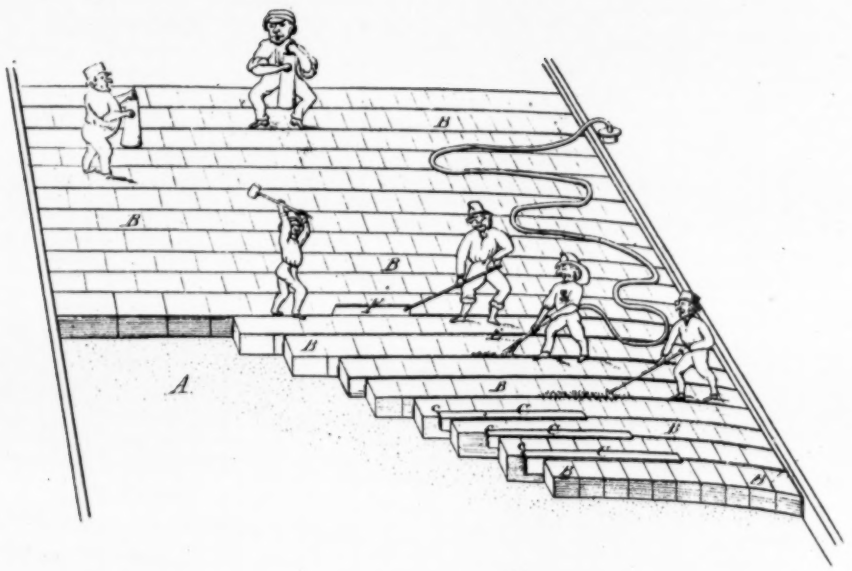
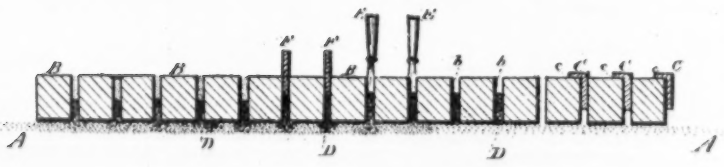


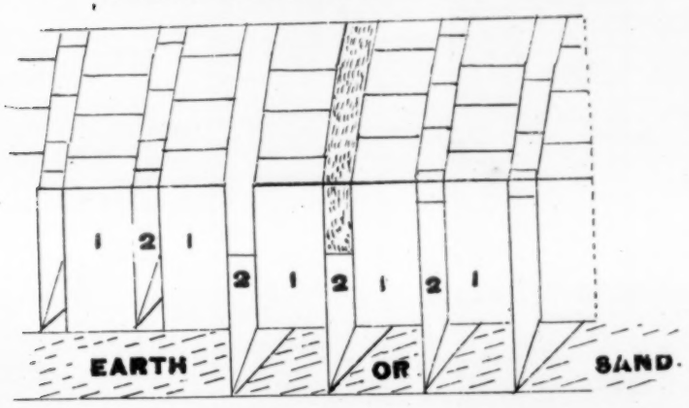
Fig. 2.



Witnesses.
C. A. Poole.
Geo. S. Prindle.

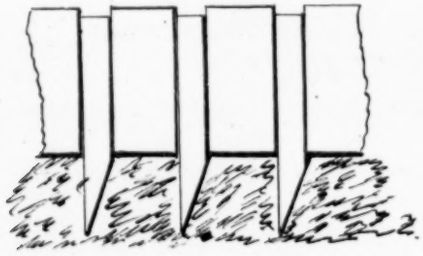
Inventor;
Edward P. Morong
by his Atty.
Thos. Wm. Clarke

Stow's 1867. Model A.



Stow's Specification.

The said blocks No. 2, may be made some two or three inches longer than the blocks No. 1, and be driven down until their upper ends are only half or three fourths of an inch, or thereabouts, below the upper end of blocks No. 1, leaving shallow grooves merely to give a foothold for horses.



Stead 1839.

Fig. 18.

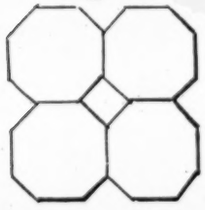
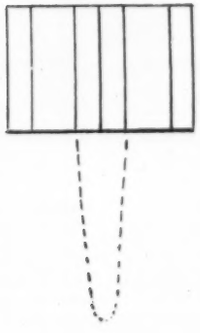
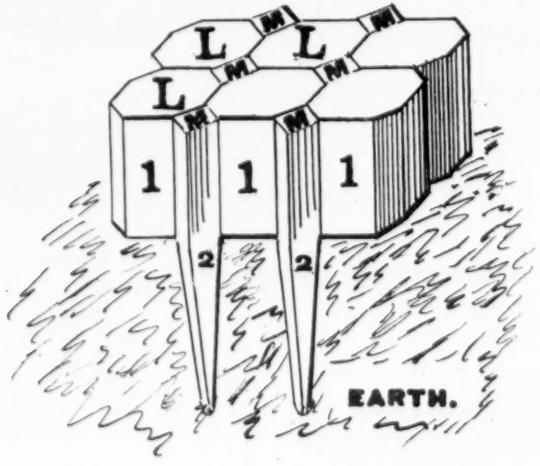


Fig. 19.



Stead's 18 & 19, 1839. Combined.

"For acclivities, I should recommend the before mentioned cavities to be left unfilled, or not to be filled up to the surface, to afford an assistance to animals."



STATE STREET BRIDGE

Thompson's Pavement Ex. G. F. Smith. 2.

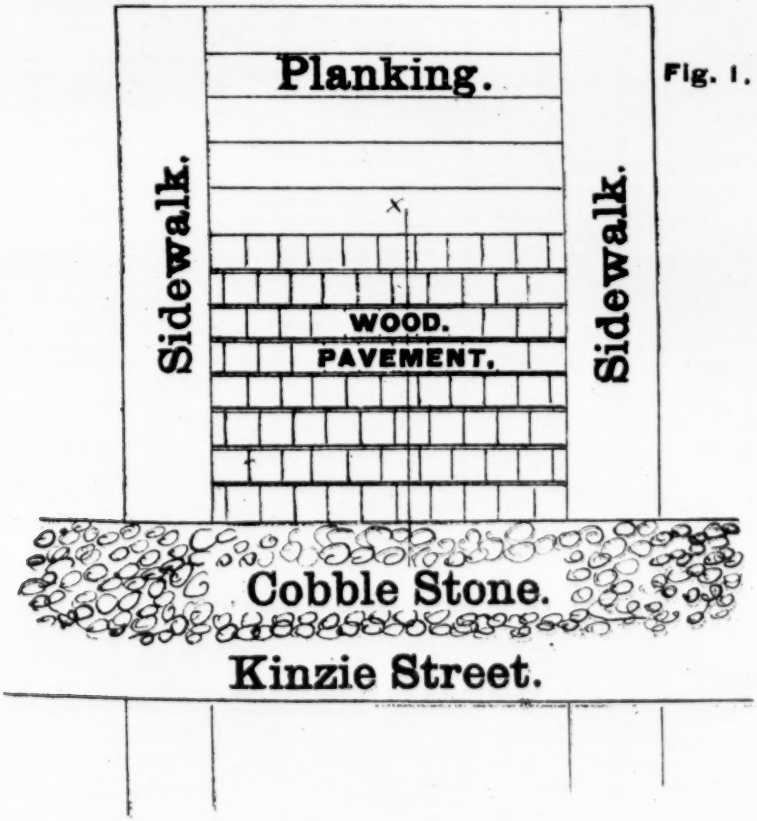


Fig. 1.

Fig. 2.

Section on Line X.